Supreme Court, U.S.
FILED
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CLERK

No. 96-568

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

versus

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 10, 1996
Certiorari Granted June 9, 1997

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118 pp

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Proceedings include all events.
2:94cv1483 Oncale v. Sundowner
Offshore, et al TERMED MAG-4

TERMED MAG-4

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)

CIVIL DOCKET FOR CASE #: 94-CV-1483

Oncale v. Sundowner Offshore, et al
Assigned to: Judge G. Thomas Porteous, Jr.
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Filed: 05/05/94
Jury demand: Plaintiff
Nature of Suite: 442
Jurisdiction: Federal Question

Cause: 42:2000e Job Discrimination (Employment)

JOSEPH ONCALE
plaintiff

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v.

SUNDOWNER OFFSHORE SERVICES, INC. defendant	Thomas Joseph Smith 504-525-2456 FAX [COR LD NTC] Galloway, Johnson, Tompkins & Burr One Shell Square 701 Poydras St. Suite 4040 New Orleans, LA 70139 (504) 525-6802 Jeffrey L. Rogers [COR LD NTC] Christopher M. Brown [COR] Brown, Parker & Leahy 3600 Citicorp Center 1200 Smith St. Houston, TX 77002 (713) 654-8111
JOHN LYONS defendant	Thomas Joseph Smith (See above) [COR LD NTC] Jeffrey L. Rogers (See above) [COR LD NTC] Christopher M. Brown (See above) [COR]
DANNY PIPPEN defendant	Thomas Joseph Smith (See above) [COR LD NTC] Jeffrey L. Rogers (See above) [COR LD NTC] Christopher M. Brown

	(See above) [COR]
BRANDON JOHNSON defendant	Thomas Joseph Smith (See above) [COR LD NTC] Jeffrey L. Rogers (See above) [COR LD NTC] Christopher M. Brown (See above) [COR]

5/5/94	1	COMPLAINT (O summons(es) issued) (sr) [Entry date 05/10/94] [Edit date 05/10/94]
5/5/94	–	Payment of filing fee by plaintiff Joseph Oncale in amount of $ 120.00 (sr) [Entry date 05/10/94]
5/10/94	–	Automatic Referral (Utility Event) to Magistrate Ronald Fonseca (sr)
6/23/94	2	WAIVER OF SERVICE sent to defendant Sundowner Offshore on 5/16/94 (bb)
7/14/94	3	ANSWER by defendant Sundowner Offshore, defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson to complaint by plaintiff Joseph Oncale [1-1] (bb) [Entry date 07/18/94]
7/20/94	4	MINUTE ENTRY (7/19/94): Status Conf set 2:45 8/8/94 by Magistrate Ronald Fonseca (bb)
8/9/94	5	MINUTE ENTRY (8/8/94): Status Conf held 2:45 8/8/94; parties do not consent to trial by Mag; pla has req jury trial by Magistrate Ronald Fonseca (bb)

8/10/94	6	NOTICE/ORDER that a preliminary conference is scheduled by telephone before courtroom deputy at 9:30 9/13/94 by Clerk (jas)
9/13/94	7	MINUTE ENTRY (9/13/94): Preliminary Conference held; amendments due within 30 days. ; pretrial conf set 8:30 3/30/95 ; jury trial set 10:00 4/10/95 ; by Judge Veronica D. Wicker (jas)
12/8/94	8	MINUTE ENTRY (12/7/94): Case reassigned to Judge Wicker/Porteous by Judge Ginger Berrigan (bb)
12/15/94	9	Notice that Case is permanently reassigned to Judge G. T. Porteous Jr. by Clerk (jd)
1/5/95	10	ORDER that the Pre-Trial Conference is set for 8:30 a.m. on 3/30/95 in chambers, jury trial is set for 4/10/95 at 10:00 a.m.; all other established & cut off will remain unchanged by Judge G. T. Porteous Jr. (dp)
1/6/95	11	Motion by defendant Sundowner Offshore, defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson and ORDER for attorneys Jeffrey L. Rogers & Christopher M. Brown to appear pro hac vice by Judge Ginger Berrigan Date Signed: 1/11/95 (gw) [Entry date 01/13/95]
2/1/95	12	Witness list submitted by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, and Sundowner Offshore (rew) [Entry date 02/02/95] [Edit date 03/14/95]

2/1/95	13	Witness list submitted by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore (rew) [Entry date 02/02/95]
2/1/95	14	Exhibit list by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore (rew) [Entry date 02/02/95]
2/1/95	15	Exhibit list by plaintiff Joseph Oncale (rew) [Entry date 02/02/95]
2/1/95	16	Witness list submitted by plaintiff Joseph Oncale (rew) [Entry date 02/02/95]
2/1/95	17	Written report of experts who may be called as witnesses for plaintiff submitted by plaintiff Joseph Oncale (rew) [Entry date 02/02/95]
2/7/95	18	MOTION by defendant John Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore for summary judgment on ground that there is no genuine issue of material fact; no hrg date set. (dp)
2/7/95	19	MINUTE ENTRY (2/7/95): ORDERED that motion by dfts, Dundowner Offshore, et al for summary judgment on ground that there is no genuine issue of material fact [18-1] previously set for 2/7/95 is CONT to 3/8/95 by at 9:30 a.m. Judge G. T. Porteous Jr. (dp) [Entry date 02/08/95]
3/1/95	20	Memo in opposition by plaintiff Joseph Oncale to motion for summary judgment on ground that there is no genuine issue of material fact [18-1] filed by defendant John

Lyons, defendant Danny Pippen, defendant Brandon Johnson, defendant Sundowner Offshore (dp)

3/10/95 21 ORDER – Hrg held 3/8/95 that the motion by dft, Sundowners for summary judgment on ground that there is no genuine issue of material fact [18-1] is submitted by Judge G. T. Porteous Jr. (dp) [Entry date 03/13/95]

3/24/95 22 JUDGMENT: in favor of dfts, Sundowner Offshore Services, John Lyons, Danny Pippen, & Brandon Johnson & agst pla, Joseph Oncale, dismissing pla's claims w/prej by Judge G. T. Porteous Jr. . .CASE CLOSED. (dp) [Edit date 10/24/96]

3/24/95 23 MINUTE ENTRY (3/23/95): ORDER granting dfts' mtn for sum jgm on ground that there is no genuine issue of material fact [18-1]. by Judge G. T. Porteous Jr. (dno)

4/19/95 24 Notice of appeal by pla Joseph Oncale from Dist. Court jgm entered 3/24/95. (dno)

4/19/95 25 Motion by plaintiff Joseph Oncale and ORDER for appearance of Nicholas Canaday III for same is GRANTED by Judge G. T. Porteous Jr. (dp) [Entry date 04/21/95]

6/1/95 – Payment of fee by plaintiff Joseph Oncale in amount of $ 105.00 (dp) [Entry date 06/02/95]

6/1/95 26 Transcript order by pla, Joseph Oncale of hrg held 3/8/95 on mtn for summary judgment. (dp) [Entry date 06/06/95]

8/21/95 27 Transcript of proceedings bfr Judge Porteours 3/8/95 (kh) [Entry date 08/25/95]

8/25/95 – Record on Appeal sent to 5th Circuit Court of Appeals consisting of 1 volume, 1 volume of transcripts. (Appeal No. 95-30510) (dp) [Entry date 08/29/95]

7/23/96 28 Judgment from 5th Circuit Court of Appeals affirming the decision of the District Court [24-1] by (Circuit Judges, Smith Duhe' & Demoss) ; Issued as mandate on 7/22/96 (dp) [Entry date 08/01/96]

8/13/96 – Record on appeal returned from U.S. Court of Appeals consisting of 2 volumes. (dp) [Entry date 08/16/96]

[END OF DOCKET: 2:94cv1483]

General Docket
Fifth Circuit Court of Appeals

95-30510 **95-30510**

Court of Appeals Docket #: 95-30510 Filed: 5/24/95
Nsuit: 3442 Civil Rights: Jobs
Oncale v. Sundowner Offshr, et al

Appeal from: Eastern District of Louisiana, New Orleans

Lower court information:

District: 053L-2 : CA-94-1483-T
Court Reporter: Victor D DiGiorgio, US Court Reporter
Ordering Judge: G Thomas Porteous, Jr, US District Judge
Date Filed: 5/5/94
Date Order/judgment: 3/24/95
Date NOA filed: 4/19/95

Fee status: Paid

Prior cases:
None
Current cases:
None

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Robert Lee Galloway
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DANNY PIPPEN
Defendant - Appellee

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JOSEPH ONCALE
Plaintiff - Appellant

v.

SUNDOWNER OFFSHORE SERVICES
INCORPORATED; JOHN LYONS; DANNY PIPPEN;
BRANDON JOHNSON
Defendants - Appellees

5/24/95	Civil rights case docketed. NOA filed by Appellant Joseph Oncale. [95-30510] Transcript Order due on 6/8/95 for Joseph Oncale. Fee due on 6/5/95 for Joseph Oncale. (ccb)
6/1/95	Fee paid by Appellant Joseph Oncale. [95-30510] Fee ddl satisfied. (ccb)
6/1/95	Transcript order received from Appellant Joseph Oncale for Vic DiGiorgio. [95-30510] Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 6/16/95 for Victor D DiGiorgio. (ccb)
6/9/95	Appearance form filed by Nicholas Canaday for Appellant Joseph Oncale, Andre C LaPlace for Appellant Joseph Oncale. [95-30510] (dse)
6/14/95	Appearance form filed by Christopher M Brown for Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr, Jeffrey L Rogers for Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr. [95-30510] (dmd)
6/29/95	Transcript order acknowledgment received from Court Reporter Victor D DiGiorgio. Estimated pages: 50 Date Financial arrangements Made: 6/23/95 [95-30510] Ct. Reporter Acknowledgement ddl satisfied. Transcript

due on 8/22/95 for Victor D DiGiorgio. Ct. Reporter Discount Date is 8/22/95 for Victor D DiGiorgio. (pok)

8/28/95 Transcript filed in district court by Court Reporter Victor D DiGiorgio on 08/21/95. [95-30510] Transcript ddl satisfied. Ct. Reporter Discount Date canceled. (cgl)

8/28/95 Record on appeal filed, Volumes: 2. [95-30510] (cgl)

8/29/95 Briefing notice issued. [95-30510] A/Pet's Brief due on 10/10/95 for Joseph Oncale. (cgl)

8/29/95 Record on appeal released to attorney Andre C LaPlace for Appellant Joseph Oncale. Volumes: 2. [95-30510] (cgl)

10/10/95 Record on appeal returned to 5CCA. Volumes: 2 [95-30510] (cgl)

10/10/95 Appellant's Brief filed by Appellant Joseph Oncale. Copies of brief: 7 # of pages: 23. Sufficient [Y/N]: n sani serif & cos does not comply. [95-30510] A/Pet's Brief ddl satisfied. E/Res's Brief due on 11/9/95 for Brandon Johnson, for Danny Pippen, for John Lyons, for Sundowner Offshr. Sufficient Brief due on 10/20/95 for Joseph Oncale. (cgl)

10/10/95 Record excerpts filed by Appellant Joseph Oncale # of copies: 4 Sufficient [Y/N]: y. [95-30510] (cgl)

10/13/95 Record on appeal released to attorney Christopher M Brown for Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr. Volumes: 2. [95-30510] (cgl)

10/18/95 Brief/Rec. exc made sufficient by Appellant Joseph Oncale [95-30510] Sufficient Brief ddl satisfied. (cgl)

10/26/95 Amicus curiae brief filed by Amicus Curiae EEOC. Copies of Brief: 8 # of pages: 20. Sufficient [Y/N]: y. [95-30510] (cgl)

10/31/95 Extension granted by phone until: 11/30/95 to file appellee's brief for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson. [95-30510] (ksw)

11/6/95 Appearance form filed by Mary L Clark for Amicus Curiae EEOC. [95-30510] (cgl)

11/9/95 Confirmation letter filed by Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson confirming an extension of time to and including 11/30/95 for filing brief. [95-30510] E/Res's Brief ddl updated to 11/30/95 for Brandon Johnson, for Danny Pippen, for John Lyons, for Sundowner Offshr. (cgl)

12/4/95 Record on appeal returned to 5CCA. Volumes: 2 [95-30510] (cgl)

12/4/95 The attorney Thomas J. Smith for Sundowner Offshr, attorney Thomas J. Smith for John Lyons, attorney Thomas J. Smith for Danny Pippen, attorney Thomas J. Smith for Brandon Johnson not participating in case. [95-30510] (cgl)

12/4/95 Brief filed by Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr. Copies of Brief: 8 # of pages: 23. Sufficient [Y/N]: n. cert of service does not comply. [95-30510] E/Res's

Brief ddl satisfied. Reply Brief due on 12/18/95 for Joseph Oncale. Sufficient Brief due on 12/14/95 for Sundowner Offshr, for John Lyons, for Danny Pippen, for Brandon Johnson. (cgl)

12/5/95 Brief/Rec. exc made sufficient by Appellee Brandon Johnson, Appellee Danny Pippen, Appellee John Lyons, Appellee Sundowner Offshr [95-30510] Sufficient Brief ddl satisfied. (cgl)

12/28/95 Briefing Complete. [95-30510] Reply Brief ddl canceled. (cgl)

1/17/96 Case tentatively calendared for oral argument Week of: 04/01/96. [95-30510] (gam)

1/23/96 Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae EEOC [206856-1]. [95-30510] (cgl)

1/26/96 Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae EEOC [209594-1]. [95-30510] (cgl)

2/22/96 Case calendared for oral argument. [95-30510] (sme)

3/7/96 Motion filed by Amicus Curiae EEOC for leave to present oral argument on 5 minutes of time ceded by appellant. [243092-1] [95-30510] (sbv)

3/14/96 COURT Order filed granting motion of amicus curiae, EEOC to participate in oral argument on five minutes of time ceded by appellant. [243092-1] (JES) Copies to all counsel. [95-30510] (sme)

3/19/96 Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae EEOC [250654-1]. [95-30510] (sme)

4/1/96 Oral argument heard. Case argued by Nicholas Canaday for Appellant Joseph Oncale, Jeffrey L Rogers for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson, Mary L Clark for Amicus Curiae EEOC [95-30510] (sme)

5/20/96 Opinion filed. If published # of pages: 4 Iss'd in T form? n Issue Mandate due on 6/10/96. [95-30510] (rmf)

5/20/96 Judgment entered and filed. [95-30510] (rmf)

6/3/96 Suggestion filed by Appellant Joseph Oncale for rehearing en banc. # of copies filed: 20 [319481-1] issue Mandate ddl canceled. [95-30510] (cgl)

6/4/96 Motion filed by Amicus Curiae EEOC to file amicus brief in support of appellant's suggestion for rehearing en banc [319518-1] [95-30510] (cgl)

6/5/96 COURT Order filed granting motion to file amicus brief in support of appellant's suggestion for rehearing en banc [319518-1] (JMD) Copies to all counsel. [95-30510] (cgl)

6/5/96 Amicus curiae brief filed by Amicus Curiae EEOC in support of appellant's suggestion for rehearing en banc. Copies of Brief: 21 # of pages: 15. Date of COS: 5/31/96 Sufficient [Y/N]: y. [95-30510] (cgl)

6/18/96 The attorney Jeffrey L Rogers for Sundowner Offshr, attorney Jeffrey L Rogers for John

Lyons, attorney Jeffrey L Rogers for Danny Pippen, attorney Jeffrey L Rogers for Brandon Johnson not participating in case. [95-30510] (cgl)

7/5/96 Appearance form filed by Robert Lee Galloway for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson, James R. Leahy for Appellee Sundowner Offshr, Appellee John Lyons, Appellee Danny Pippen, Appellee Brandon Johnson. [95-30510] (cmb)

7/12/96 COURT Order filed denying suggestion for rehearing en banc [319481-1] With poll (Y/N)?: y Issue Mandate due on 7/19/96. (JES/JMD/HRD) Copies to all counsel. [95-30510] (cmb)

7/22/96 Mandate issued. Approved BOC Issued (Y/N)?: n [95-30510] Issue Mandate ddl satisfied. (cmb)

7/25/96 Record on appeal forwarded by CDK to JMD. [95-30510] (cmb)

8/9/96 Record on appeal returned to 5CCA. Volumes: 2 [95-30510] (cmb)

8/9/96 Record on appeal returned to USDC. Volumes: 2. [95-30510] (cmb)

10/11/96 Supreme Court notice that petition for certiorari was filed on 10/10/96 by Appellant Joseph Oncale. Supct No.: 96-568 (cmb)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. No. 94-1483
VERSUS	JUDGE: SECT. LMAG.4
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	MAGISTRATE: (C) CIVIL COMPLAINT AND JURY DEMAND

****

COMPLAINT FOR DAMAGES

Plaintiff, **Joseph Oncale**, complains of the defendants and shows the Court the following:

JURISDICTION

1.

This is a claim for damages brought by an employee against his employer and some of his co-workers. The jurisdiction of the Court is found under 29 U.S.C. 1331, which allows the District Court of the United States jurisdiction where there exists a question or questions of Federal law.

PARTIES

2.

The plaintiff, **Joseph L. Oncale,** is a resident of and domiciled at 13679 Ventress Road, in the Town of Ventress, Parish of Pointe Coupee, State of Louisiana.

3.

The defendant, **Sundowner Offshore Services, Inc.,** is a foreign corporation, authorized to do and doing business in the State of Louisiana, and duly incorporated in the State of Nevada, whose principal place of business is in Texas, and whose agent for service of process is Prentice Hall Systems, Inc., 203 Carondelet Street, Suite 811, New Orleans, LA, 70130.

The defendant, **John Lyons,** is a resident of Lafourche Parish, State of Louisiana.

The defendant, **Danny Pippen,** is a resident of Plaquemines Parish, State of Louisiana.

The defendant, **Brandon Johnson,** is a resident of the State of Louisiana.

CAUSE OF ACTION

4.

This action is brought pursuant to the Civil Rights Act, as amended, at Section 703(a)(1) of Title VII, and 42 U.S.C., Sec. 2000 (e)-2 (a)(1). The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights guaranteed by Federal law which provides for injunctive and other relief against sexual discrimination and harassment in employment practices.

5.

The plaintiff, Joseph L. Oncale, is a citizen of the United States and resides in the Parish of Pointe Coupee, State of Louisiana. He is 24 years old and was employed

by Sundowner Offshore Services, Inc., as a roustabout on Chevron USA's offshore platform, 266-A and 266-B, Ship Shoal Block, in the Gulf of Mexico. On or about October 25, 1991 and October 26, 1991, the plaintiff was sexually harassed by his co-workers, defendants John Lyons, Danny Pippen, and Brandon Johnson, and as a result of continuous harassment, was forced to resign his position as a roustabout on November 10, 1991.

6.

The defendant, **Sundowner Offshore Services, Inc.,** is an employer with an office in Houma, Louisiana, who engages in an industry affecting commerce and employs more than twenty (20) regular employees.

7.

The plaintiff filed timely charges of sexual discrimination and harassment with the Equal Employment Opportunity Commission and has met all administrative prerequisites for bringing this action.

8.

The defendant, **Sundowner Offshore Services, Inc.,** engaged in policies and practices which willfully, or in the alternative unwillingly, discriminated against or allowed harassment against the plaintiff on the basis of his sex, including but not limited to the following acts:

A. allowing the harassment to continue after the plaintiff made several complaints to Sundowner supervisors;

B allowing the defendants, John Lyons and Danny Pippen, who were Sundowner supervisors, to continue in their supervisory position over the plaintiff after complaints were made.

The defendants, John Lyons, Danny Pippen, and Brandon Johnson intentionally discriminated against and harassed the plaintiff on the basis of his sex, including but not limited to the following acts:

A. Pippen holding the plaintiff down, while Lyons put his exposed penis on the back of the plaintiff's head, in front of the crew, on October 25, 1991;

B. Johnson grabbing and holding down plaintiff, while Lyons again put his exposed penis on the plaintiff's arm, on October 26. 1991;

C. Pippen and Lyons holding the plaintiff down in the shower, while Lyons rubbed a bar of soap between the cheeks of the plaintiff's buttocks;

D. the defendants, Lyons and Pippen, repeatedly making vulgar and demeaning remarks to the plaintiff during the above described incidents, as well as on other occasions;

E. any and all other sexually discriminatory and harassment practices against the plaintiff that will be proven at a trial on the merits of this matter.

10.

All of the above acts of the defendants violate the plaintiff's Title VII civil rights, as outlined in the Civil Rights Act of 1991, as amended, and 42 U.S.C., Sec. 2000 (e)-2(a)(1). The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this action for (damages) is his only means of securing adequate relief.

WHEREFOR, the plaintiff, Joseph Oncale, respectfully prays that the Court:

A. Grant the plaintiff an order requiring the defendant, Sundowner Offshore Services, Inc., to reinstate the plaintiff to his former position or to a position similar in responsibilities and pay, taking into account any retroactive promotions, and to make the plaintiff whole, by an award of appropriate back pay, prejudgment interest, and fringe benefits including health and life insurance, retirement and pension benefits, and all expenses which the employer would have paid in the normal course of business, and otherwise, for the violations described above;

or, in the alternative,

If the defendants cannot reinstate the plaintiff, to enter an order which will make the plaintiff whole, by requiring the defendant to pay as damages to the plaintiff: appropriate back pay, front pay, and fringe benefits, including health and life insurance, retirement and pension benefits, and all expenses which the employer would have paid in the normal course of business, prejudgment interest, and other compensation to the plaintiff for the violations described above;

B. Enter judgment in favor of the plaintiff, Joseph Oncale, and against the defendants, Jon Lyons, Danny Pippen, and Brandon Johnson after due proceedings, for any and all damages as are reasonable in the premises as a result of the above-mentioned occurrences.

C. Award the plaintiff costs of this action, including reasonable attorney's fees and liquidated damages, and such other and further relief that this Court may deem just, proper and equitable;

D. Grant an order enjoining the defendants from engaging in such unlawful employment practices, and order any other affirmative action as may be appropriate in this circumstance;

E. For a trial by jury of this cause.

Respectfully Submitted,

Attorney for Petitioner:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. NO. 94-1483
VERSUS	JUDGE: SECT. L MAG. 4
SUNDOWNER OFFSHORE SERVICES INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	MAGISTRATE: (C) CIVIL COMPLAINT AND JURY DEMAND

****

ANSWER OF DEFENDANTS SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON

Sundowner Offshore Services, Inc. ("Sundowner"), **John Lyons** ("Lyons"), **Danny Pippen** ("Pippen") and **Brandon Johnson** ("Johnson"), Defendants (collectively, "Defendants") in this action, hereby answer the claims of the Plaintiff, **Joseph Oncale** ("Plaintiff"), alleging and stating the following:

FIRST DEFENSE

1. There is lack of jurisdiction over the subject matter and the person for the following reasons:

A. 29 U.S.C. 1331, cited by Plaintiff in Paragraph 1 of his original Complaint does not confer jurisdiction over the Defendants.

B. The facts alleged by Plaintiff complain of sexual harassment by a male to a male. These activities do not support a cause of action for sexual harassment under § 703(a)(1) of Title VII

and 42 U.S.C., § 2000(e)-2(a)(1) absent homosexual advances or intent on the part of the Defendants. Plaintiff has failed to allege any facts which would indicate homosexual motivation on behalf of any of the Defendants.

SECOND DEFENSE

2. Plaintiff has failed to state a cause of action upon which relief can be granted.

THIRD DEFENSE

For its third defense to the allegations of the Complaint, Defendants state and allege as follows:

3. Defendants deny the allegations of Paragraph 1 of the Complaint.

4. As to the allegations contained in Paragraph 2 of the Complaint, Defendants are without knowledge sufficient to admit or deny this paragraph.

5. Defendants admit the allegations contained in Paragraph 3 of the Complaint.

6. Defendants admit that the statute cited in Paragraph 4 of the Complaint addresses sexual harassment and sexual discrimination but deny that it is applicable to the alleged actions of the Defendants.

7. Defendants deny the allegations contained in Paragraph 5 of the Complaint.

8. Defendants admit the allegations contained in Paragraph 6 of the Complaint.

9. Defendants admit the allegations contained in Paragraph 7 of the Complaint.

10. Defendants deny the allegations contained in Paragraph 8 of the Complaint.

11. Defendants deny the allegations contained in Paragraph 10 of the Complaint.

AFFIRMATIVE DEFENSE

12. Defendants' affirmatively plead that Plaintiff has failed to assert proper grounds for jurisdiction over the subject matter or over the person.

13. The claims made by Plaintiff do not amount to sexual harassment pursuant to the Civil Rights Act as amended at § 703(a)(1) of Title VII and 42 U.S.C., § 2000(e)-2(a)(1) because the activity complained of was asserted by a male to another male without homosexual intent.

PRAYER

WHEREFORE, Defendants, Sundowner Offshore Services, Inc., John Lyons, Danny Pippen and Brandon Johnson, pray the following:

a. Plaintiff's claims be dismissed for lack of jurisdiction;

b. Plaintiff take nothing by reason of his complaint, that judgment be rendered in favor of Defendants;

c. Defendants be awarded their costs of suit incurred in defense of this action; and

d. For such other relief as the Court deems proper.

Respectfully submitted,

Attorneys for Defendants:

BROWN, PARKER & LEAHY, L.L.P.

By: /s/ Christopher M. Brown
JEFFREY L. ROGERS
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Houston, Texas 77002
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Answer was sent by United States certified mail, return receipt requested, on this 12th day of July, 1994, to Andre P. LaPlace, 2762 Continental Drive, Suite 103, Baton Rouge, Louisiana 70808.

/s/ Christopher M. Brown
CHRISTOPHER M. BROWN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

V. C.A. NO. 94-1483

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN AND BRANDON JOHNSON JUDGE: SECT. T. MAG 4

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippin and Brandon Johnson, individually, and move the Court for summary judgment on the ground that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Under established law and Fifth Circuit precedent, the discrimination and harassment of which Plaintiff, a male, complains is not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq.

As part of his prima facie case, Plaintiff must prove that Defendants harassed and discriminated against him on the basis of his sex. A plaintiff must show that he was singled out and treated by the defendant differently than the defendant treated members of the opposite sex. Claims similar to Plaintiff's have been rejected by courts on the grounds that same sex discrimination of this type is not contemplated by Title VII. Because Plaintiff was working in an exclusively male environment, he will not

be able to establish a critical element of his prima facie case for discrimination and harassment.

Additionally, Johnson and Pippin are entitled to summary judgment as a matter of law since neither of these individuals acted as Plaintiff's employer, nor did they act in any supervisory capacity relative to the Plaintiff. Mere coworkers cannot be held liable for sexual discrimination or harassment under Title VII.

Because there are no genuine issues as to any material fact surrounding Plaintiff's claim, summary judgment is appropriate. Fed. R. Civ. P. 56.

Defendants respectfully move this Court to grant this Motion for Summary Judgment and pray for such other and further relief, both at law and in equity to which they may show themselves to be justly entitled.

This motion is based upon this document, the accompanying Memorandum in Support of Motion for Summary Judgment, all pleadings and papers on file in this action, and upon such other matters as may be presented to the court at the time of the hearing.

DATED: February 1, 1995

Respectfully submitted,

BROWN, PARKER & LEAHY, L.L.P.

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permission CMB
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70139

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day February 1995, a true and correct copy of the above and foregoing instrument was served on all counsel of record as follows, in accordance with the Federal Rules of Civil Procedure, via U.S. Postal Service, postage pre-paid.

Andre LaPlace
2762 Continental Drive, Suite 103
Baton Rouge, LA 70808

/s/ Christopher M. Brown
Christopher M. Brown

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. NO. 94-1483
V.	JUDGE: SECT. T MAG. 4
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN, AND BRANDON JOHNSON	CIVIL COMPLAINT AND JURY DEMAND

DEFENDANTS SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN, AND BRANDON JOHNSON'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Plaintiff brings this sexual discrimination and sexual harassment claim against Defendants Sundowner Offshore Services, Inc. ("Sundowner), John Lyons ("Lyons"), Danny Pippin ("Pippin"), and Brandon Johnson ("Johnson"), individually, pursuant to the Civil Rights Act of 1964, as amended, at Section 703(a)(1) of Title VII, and 42 U.S.C., Sec. 2000(e)-2(a)(1) ("Title VII"). Plaintiff was employed by Sundowner as a roustabout on an offshore well platform serviced by Sundowner, resigning his position after approximately five weeks. Plaintiff, a male, alleges that during the time of his employment, Sundowner failed to provide a suitable working environment because he was subjected on several occasions to verbal and physical harassment from one of his male supervisors, Lyons, and two of his co-workers, Pippin and Johnson, while working on the rig.

II.

SAME-SEX TITLE VII CLAIMS

Title VII of the Civil Rights Act of 1964, as amended, makes it "an unlawful employment practice for an *employer* . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin." 42 U.S.C. Sec. 2000e-2(a)(1) (emphasis added). In enacting Title VII, Congress intended to address the problems arising from disparate treatment of persons on the basis of their sex. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993). "Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender." *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994). Faced with facts similar to those in the instant case, courts have rejected plaintiffs' claims of sexual harassment in a same-sex context. *See, e.g., Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993). In *Goluszek*, the plaintiff alleged that he had been verbally harassed on numerous occasions by co-workers who made sexual references, and physically harassed plaintiff by poking him in the buttocks with a stick. *Id.* at 1453-54. Additionally, plaintiff complained that the employer had failed to correct the situation even after being informed of the problem. *Id.* The *Goluszek* court refused to expand the scope of Title VII liability to a form of conduct that was never contemplated by Congress when it enacted this legislation. *Id.* at 1456. Harassment by male supervisors against male subordinates, particularly in an exclusively

male environment, "is not the type of conduct Congress intended to sanction when it enacted Title VII". *Id.*

Title VII would be "strained beyond its manifest intent" if this court were to acknowledge a claim of sexual harassment where the alleged harasser and the alleged victim are both of the same gender. *Hopkins v. Baltimore Gas & Elec. Co.*, Civ. No. H-93-4167, 1994 U.S. Dist. LEXIS 18586 (D. Md. Dec. 28, 1994). Accordingly, this court should reject Plaintiff's claims as a matter of law and grant summary judgment as to all defendants.

II.

HOSTILE WORK ENVIRONMENT HARASSMENT

In his complaint, Plaintiff has failed to state what kind of Title VII sexual discrimination Sundowner, Lyons, Pippin and Johnson are alleged to have committed. There are two types of actionable sexual discrimination under Title VII: *quid pro quo* harassment and hostile work environment harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). Although it is believed that Plaintiff's allegations sound only in hostile environment harassment, for the purposes of completeness both types of discrimination will be addressed.

A Plaintiff establishes a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. *Meritor* at 66. If a plaintiff alleges a hostile work environment, the critical inquiry for the courts is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed". *Harris*, 114 S.Ct. 367, 372 (1993) (Ginsburg, J.,

concurring); *accord*, Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. Sec. 1604.11 (1985) (concluding appropriate inquiry is whether harasser treats member of one sex differently than member of opposite sex).

The Fifth Circuit does not recognize same-sex harassment claims under Title VII. *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994). The allegations made by Plaintiff are similar to those made by the charging party in *Garcia*. Garcia alleged that he had been sexually harassed by a male supervisor at his place of employment. Several incidents of harassment were cited, including occasions where the supervisor had "reached around and grabbed [Garcia's] crotch area and made sexual motions from behind [Garcia]." *Garcia* at 448. The Fifth Circuit held that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Garcia* at 451-52 (citing *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. 1993) (unpublished).

Plaintiff alleges that he was physically and verbally harassed by Lyons, Pippin and Johnson on several occasions. Even assuming that these allegations are true, "Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable." *Goluszek* at 1456. Even absent this controlling precedent, Plaintiff would fail to establish his prima facie case for a hostile working environment cause of action. The Fifth Circuit has adopted a five-part test to determine if a hostile working environment harassment claim exists: 1) plaintiff belongs

to a protected group; 2) plaintiff was subject to unwelcome sexual harassment; 3) the harassment complained of was based upon the plaintiff's sex; 4) the harassment complained of affected a "term, condition, or privilege" of employment; *and* (5) the plaintiff's employer knew or should have known of the harassment and failed to take remedial action. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 193 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 968, 117 L.Ed. 133 (1992).

It is the third element that mandates summary judgment in favor of Defendants – harassment on the basis of the charging party's sex. Plaintiff cannot show that, "but for his being male, he would not have been treated by his co-workers in the manner that he was." *Polly v. Houston Lighting & Power Co.*, 825 F.Supp. 135, 137 (S.D. Tex. 1993). Plaintiff has not and cannot allege facts which would support the notion that Sundowner, Lyons, Pippin and Johnson allowed and maintained a work environment that treats males as inferior, as opposed to the way it treats females. It cannot be disputed that only males were employed by Sundowner on the platform. *See* Exhibit "B", Affidavit of Ed DuBroc, Personnel Manager of Sundowner. Sundowner, Lyons, Pippin and Johnson did not create nor foster anti-male sentiment in the workplace. Plaintiff cannot show that he was singled out for different treatment on the basis of his sex.

III.

QUID PRO QUO SEXUAL HARASSMENT

The alternative type of harassment, *quid pro quo* sexual harassment, typically takes the form of a demand for

sexual favors, with the harasser being in a position to adversely affect the employee's working conditions if those demands are rejected. A charging party must prove the following: 1) that the employee belongs to a protected group; 2) the employee was subject to unwelcome sexual harassment; 3) the harassment complained of was based upon sex; 4) the employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment, *and* (5) the employee's rejection or acceptance of the harassment must be an expressed or implied condition of the receipt of a job benefit or must cause tangible job detriment; and the employer knew or should have known of the harassment and failed to take remedial action. *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

Charging parties who are male have prevailed against male supervisors when it has been proven that the supervisor was homosexual and, thus, were able to prove that the harasser discriminated against the subordinate on the basis of his sex. *See, e.g., Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537, 542 (N.D. Al. 1983) (finding *quid pro quo* sexual harassment where homosexual supervisor requested sex from male subordinate); *accord, Wright v. Methodist Youth Services, Inc.*, 511 F.Supp. 307 (N.D. Ill. 1981) (noting that same sex harassment is actionable if it is based on the victim's sex and the harasser does treat members of the opposite sex differently). Those cases are distinguishable from this case. Here, Plaintiff admitted to an EEOC investigator that he does not know or believe that Lyons, Pippin or Johnson are homosexuals. *See* EEOC Investigation Report, attached as Exhibit "A". Further,

Plaintiff does not allege that Lyons, Pippin or Johnson demanded that Plaintiff engage in any sexual acts, nor does Plaintiff allege that they linked any sexual demands to Plaintiff's job performance or threatened him with repercussions if he refused any demands made on the basis of his sex. Plaintiff's claim, if any, of *quid pro quo* sexual harassment must therefore fail.

IV.

DEFENDANTS PIPPIN AND JOHNSON

Liability under Title VII will attach to a plaintiff's employer, not mere co-workers. Agency principles extend liability to those individuals who have been delegated authority traditionally held by the employer. Typically, an employee can be held liable as an agent for the employer if that employee has the ability to direct work assignments, or can hire and fire. *Garcia* at 451. A co-worker who is not the employer's agent and has no supervisory responsibilities relative to a charging party cannot be held liable under Title VII. *Harvey v. Blake*, 913 F.2d 226, 228 (5th Cir. 1990).

Johnson was employed by Sundowner as a floorhand during Plaintiff's employment, and as such, had no authority to set Plaintiff's work schedule or priorities or to affect Plaintiff's employment status. *See* Exhibit "B". Pippin was employed by Sundowner as a driller throughout Plaintiff's employment. Under Sundowner's rig crew hierarchy, Pippin had no authority over Plaintiff. Both Johnson and Pippin were only Plaintiff's co-workers; they were not agents of Sundowner with any supervisory authority over Plaintiff. *See* Exhibit "B".

In his complaint, Plaintiff has charged both Johnson and Pippin with sexual discrimination and sexual harassment. It cannot be disputed that neither Johnson nor Pippin were acting as Plaintiff's 'employer'. Accordingly, summary judgment should be granted in favor of both Johnson and Pippin.

V.

CONCLUSION

Case law and 5th Circuit precedent are clear – when the plaintiff cannot prove that harassment was instigated on the basis of the plaintiff's sex, same-sex harassment is not actionable under Title VII. In this case, Plaintiff cannot prove the alleged incidents occurred solely because the Plaintiff was male, because there were no members of the opposite sex either employed by Sundowner or located on the offshore platform. Thus, Plaintiff cannot establish his prima facie case for either *quid pro quo* or hostile environment sexual harassment against Sundowner or Lyons because any discrimination and/or harassment which occurred could not have been perpetrated on the basis of sex. Johnson and Pippin, as mere co-workers, had no supervisory responsibility over the Plaintiff and, as such, are beyond the scope of Title VII liability. For these reasons, all defendants are entitled to summary judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56.

WHEREFORE, in consideration of the foregoing, Defendants Sundowner, Lyons, Pippin and Johnson request that this Court grant its Motion for Summary Judgment, and pray for such other and further relief,

both at law and in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

BROWN, PARKER & LEAHY, L.L.P.

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New Orleans, Louisiana 70139

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 1995, a true and correct copy of the above and foregoing instrument was served on all counsel of record as follows, in accordance with the Federal Rules of Civil Procedure, via U.S. Postal Service, postage pre-paid.

Andre LaPlace
2762 Continental Drive, Suite 103
Baton Rouge, LA 70808

/s/ Christopher M. Brown
Christopher M. Brown

EXHIBIT "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	C.A. NO. 94-1483
VERSUE	JUDGE: SECT. L (C); MAG. 4
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPIN, AND BRANDON JOHNSON,	MAGISTRATE: (C)

AFFIDAVIT OF EDWARD M. DUBROC

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared Edward M. DuBroc, who being first duly sworn, upon his oath deposed and said:

"My name is Edward M. DuBroc and I am the personnel director for Sundowner Services, Inc. ("Sundowner"). I am over the age of eighteen (18) years, of sound mind, have never been convicted of a felony, and am fully competent and duly authorized to make this affidavit. I have personal knowledge of all facts stated in this affidavit, and they are all true and correct.

"I have served as personnel director at Sundowner since February 1, 1993. My job responsibilities include, among other things, administering employment polices [sic] for Sundowner, maintaining employment files, and assuring qualified persons are hired for employment by Sundowner. Based on the records maintained by Sundowner, I have knowledge of all job descriptions and responsibilities of each person employed by Sundowner.

"Joseph Oncale was hired by Sundowner on October 7, 1991. Sundowner records indicate that he voluntary resigned from this position on November 10, 1991. He was employed by Sundowner as a roustabout. His direct supervisor on the rig would have been Johnny Lyons, crane operator.

"At the time of Mr. Oncale's employment, Danny Pippin was employed by Sundowner as a driller. The driller is the direct supervisor of derrick hands and/or floor hands. He is not the direct supervisor of the roustabouts. Mr. Pippin did not maintain supervisory control over Joseph Oncale during his period of employment with Sundowner.

"Brandon Johnson was employed as floor hand on the drilling crew during Mr. Oncale's employment. His direct supervisor was Danny Pippin. Mr. Johnson is not in a supervisory capacity and did not supervise Joseph Oncale at any time.

"Based on Sundowner's files and my own personal knowledge, no females were employed by Sundowner on any drilling or workover rig during the time of Mr. Oncale's employment.

Further Affiant sayeth not.

[Seal]

/s/ Edward M. DuBroc
EDWARD M. DUBROC

SUBSCRIBED AND SWORN TO BEFORE ME on this 31st day of January, 1995, to certify which witness my hand and seal of office.

[Seal]

/s/ Iwona J. Sears
Notary Public in and for
The State of Texas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

VERSUS

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON

C.A. NO. 94-1483

JUDGE: SECT. T MAG 4

MAGISTRATE: (C)

****

STATEMENT OF MATERIAL FACTS IN DISPUTE

Pursuant to Rule 2.10E of the Uniform District Court Rules, plaintiff Joseph Oncale asserts in opposition to the summary judgment motion brought by Sundowner Offshore Services, Inc., John Lyons, Danny Pippen and Brandon Johnson, that there exists genuine issues to be tried with regard to the following material facts:

1. The actions and statements of Danny Pippen when on October 25, 1991 he restrained Joseph Oncale to assist with and participate in a sexual assault upon Mr. Oncale by defendant John Lyons.

2. Danny Pippen's desires, thoughts and intent as he held Joseph Oncale on October 25, 1991 while John Lyons placed his penis on Joseph Oncale.

3. John Lyons exact actions and words on October 25, 1991 as he placed his penis on Joseph Oncale's neck.

4. John Lyons' desires and intent as he placed his penis on Joseph Oncale as Mr. Oncale was restrained by a co-employee on October 25, 1991.

5. Whether, and with what intent, John Lyons declared on October 25, 1991 that he intended and actively desired sexual intercourse with Joseph Oncale.

6. Whether, and with what intent or desire, Brandon Johnson grabbed Joseph Oncale on October 26, 1991 as Mr. Oncale was attempting to depart from a personnel basket.

7. Whether, and with what intent, John Lyons displayed his penis and placed it on Joseph Oncale's arm on October 26, 1991.

8. Whether, and with what intent, desire or motivation, Danny Pippen and John Lyons acted in concert during the evening hours of October 26, 1991 to grab Joseph Oncale while showering, forcing a bar a [sic] soap into his anus and stating that they wished to have homosexual sex with him.

9. Whether, and to what extent, Sundowner Offshore Services, Inc.'s Safety Compliance Clerk, Mr. Valent Hoen, Jr. and Sundowner's Toolpusher, Mr. Butch Edwards, were aware of and condoned the sexual assaults committed by supervisory personnel upon the plaintiff.

10. The extent to which John Lyons, Crane Operator, and, or Danny Pippen, Driller, supervised and controlled the terms, conditions and duration of Mr. Oncale's employment with Sundowner Offshore Services, Inc.

11. Whether, and to what extent, Danny Pippen, Driller, exercised supervisory authority over and, control over, Joseph L. Oncale.

12. Whether, and to what extent, John Lyons, continued his verbal assaults and promises of

homosexual rape of your claimant during the week ending November 10, 1994.

13. The supervisory personnel's, including safety compliance officer and toolpushers, knowledge of, and response to, the activities of the individual defendants.

14. The contents and enforcement of sexual discrimination policies by Sundowner Offshore and the factual basis for alleged respondeat superior liability.

15. The perceptions of Joseph Oncale that he must submit to sexual abuse as a condition of his employment and the reasonableness of those perceptions.

RESPECTFULLY SUBMITTED:

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Counsel for Joseph Oncale

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	
VERSUS	C.A. NO. 94-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	JUDGE: SECT. T MAG 4
	MAGISTRATE: (C)

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

May it please the Court:

Your defendants, Sundowner Offshore Services, Inc. and three of its direct employees, invite this Court to summarily dismiss Joseph Oncale's sexual harassment action because, to quote the defendants' motion, "under established law . . . the discrimination and harassment of which Oncale, a male, complains is not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq." Given that every material fact, with the possible exception of the dates of Mr. Oncale's employment with Sundowner Offshore Services, Inc., are in dispute or are not susceptible to summary resolution and given, further, that the case law relied upon by the Defendants does not reflect an unqualified repudiation of male-on-male sexual harassment claims under Title VII of the Civil Rights Act, the Defendants' invitation should be refused and this matter should proceed towards trial.

Without consideration of the facts and circumstances surrounding the weeks of sexual terror and actual sexual

assault to which Joseph Oncale was subjected by the individual defendants, or the desires, intentions and motives of these individuals, the defendants seek summary dismissal. Without any discussion of the manner in which Sundowner's Director of Safety and its Toolpusher (Sundowner's highest ranking employees on the job site) stood idly by with full knowledge of the conduct of Lyons, Pippen and Johnson, Sundowner Offshore would have this Court find that no genuine issues of material fact exists and that, as a matter of law, Joseph Oncale is not entitled to proceed to trial.

Without reference to the fact that Joseph Oncale reasonably believed that submission to his direct supervisor's homosexual advances had become a condition of employment, sundowner would have this court conclude that no fact questions need be tried. The central thrust of the summary judgment argument is that under no circumstances can this Court allow recovery in this or any other "male-on-male" sexual harassment claim. There being no blanket prohibition in the law to recovery under Title VII by a male employee who is sexually harassed by other male employees who control the terms, conditions and duration of the victim's employment while a fully informed Safety Director and Toolpusher take no action, the motion for summary must fail and the claims must be tried.

To the extent that the defendants abandon their absolute argument, i.e., that there can never be a male victim, and assert that there are no unresolved facts material to the "quid pro quo" aspects of Mr. Oncale's action, the summary judgment motion falls under its own weight. Obviously there are many unresolved factual matters

inherent in the pending claims. These include: Are the individual defendants homosexual? Whether or not they are actual homosexuals (whatever this means?) did the individual defendants, who controlled the terms, conditions and duration of Mr. Oncale's chosen employment, demand, solicit or take homosexual favors from Joseph Oncale? Was submission to sexual advances an explicit or implicit condition of Mr. Oncale's employment? Were Mr. Oncale's beliefs that he was being forced to submit to sexual assaults as a condition of his employment reasonable under the circumstances? See, further, the factors listed in *Jones v. Flagship International*, 793 F.2d 714, 719-20 (5th Cir. 1986). Plainly, a claim so fact-specific and fact-dependent cannot be resolved through a summary judgment motion.

I. STATEMENT OF THE CASE

Mr. Oncale's claim arises out of a series of events that occurred during his employment with Sundowner Offshore Services between August and November of 1991. Primarily, Joseph Oncale asserts that he was denied his civil and employment rights in violation of law as he was sexually assaulted, battered, touched, and threatened with homosexual rape by his direct supervisor, John Lyons, with the assistance of a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised de facto control over the terms and conditions of Joseph Oncale's employment, The third individual defendant, Brandon Johnson, a roustabout, assisted John Lyons in one of the attacks. Mr. Oncale, who suffered several

direct, sexual assaults and innumerable threats of continuing sexual abuse and who twice reported the situation to his employer's highest ranking personnel on the job site, to no avail, was forced to quit his employment as he feared that were he to stay he "would be raped or forced to have sex." *Deposition of Joseph Oncale, page 64, pages 72-75, attached as Exhibit A hereto.* A detailed description of the vulgar and violent actions of the individual defendants and the circumstances under which Joseph Oncale reported the ongoing situation to his toolpusher and safety director is set forth in the affidavit completed by Mr. Oncale thought the E.E.O.C.; *which was marked and introduced by counsel for Sundowner as Exhibit One to the deposition of Joseph Oncale and is attached hereto as Exhibit B. See also the deposition of Brandon Johnson, pages 41-45, attached as Exhibit C in which he describes how John Lyons "said he was going to put his dick on (Oncale)" as he, Johnson, restrained Joseph Oncale.*

The testimony of Mr. Oncale, which mirrors the affidavit he submitted to the E.E.O.C., can be summarized further: Joseph Oncale will testify that his immediate supervisor, John Lyons, and another supervisor, Danny Pippen, who had de facto control over Mr. Oncale's employment, physically restrained him while John Lyons placed his penis on Mr. Oncale's arm on two occasion [sic] and violated him sexually when, on a third occasion John Lyons forced an object into Mr. Oncale's anus while Danny Pippen held Mr. Oncale. The supervisors repeatedly assured Mr. Oncale that they desired and intended sexual intercourse and that they would continue with their assaults as long as Mr. Oncale remained employed on the Sundowner rig; *see Oncale Deposition Exhibit A,*

pages 58-61. The Safety Director and Toolpusher; the "men in charge" for Sundowner did nothing to halt the repeated sexual threats and sexual battery. Instead, Mr. Lyons stated that Oncale's attempts to report the assaults would not bring an end to the ordeal; *see Oncale Deposition Exhibit A, pages 73-74.*

As testified to by Brandon Johnson, Joseph Oncale was not a lone [sic] or isolated victim of the sexual assaults committed by John Lyons, The testimony to be presented at trial will include the testimony of other victims of John Lyons and Mr. Johnson's description of how, several weeks prior to the assaults on Joseph Oncale, John Lyons, again with the assistance of the other individual defendants, held down a worker by the name of Kent Brumfield and "sucked a hickey on his neck." *Brandon Johnson Deposition, Exhibit C, pages 53-55, pages 75-77.*

The deposition testimony of Danny Pippen is that the actions complained of by Joseph Oncale do not constitute "horseplay" within the community of offshore laborers. Further, this witness testified that as a driller he had the authority to direct Mr. Oncale's work activities. *Deposition of Danny J. Pippen, attached as Exhibit D, pages 22-32.*

The events outlined by Joseph Oncale in his deposition testimony and affidavit to the E.E.O.C., the occurrence of which is accepted for purposes of this motion, establish an actionable claim for discrimination on the basis of sex. As the evidence establishes the homosexual proclivities of Joseph Oncale's direct supervisor and his direct and violent demands that Joseph Oncale submit to these advances as a condition of employment and the

inaction of the employer in the face of actual knowledge of the pattern of sexually-based harassment, the motion for summary judgment should be denied. See, generally, *Joyner v. AAA Cooper Transportation*, 597 F. Supp. 537 (M.D. AL. 1983).

II. SUMMARY JUDGMENT PRINCIPLES

(A) General Statement

It is well established that a defendant moving for summary judgment bears the burden of showing an absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. Substantive law determines the materiality of facts for summary judgment purposes. See, generally, *Kelly v. United States*, 805 F.Supp. 14 (E.D. LA. 1992). A fact is "material" for purposes of summary judgment analysis if it may affect the outcome of case. The dispute is "genuine" if trial is necessary to resolve evidentiary disagreements. The moving party bears the initial burden of showing that there is no genuine issue for trial. A dispute about a material fact is said to be "genuine" if the evidence would permit a reasonable jury to return a verdict for the non-moving party. See, generally, *Society of Financial Examiners v. National Association of Fraud*, 41 F.3d 223 (5th Cir. 1995).

Applying these standards to this case in which virtually every "fact" is in dispute requires the conclusion that summary judgment is inappropriate. The material facts about which there exists a genuine dispute include, but are not limited to, the manner in which the individual defendants battered and stated their desire to "fuck" Joseph Oncale and their state of mind or sexual stirrings

or desires as they did so. Further, the genuine facts in dispute include Joseph Oncale's perception of the sexual attacks and the basis and reasonableness of his belief is that the only way he could protect himself, given the inactions of supervisory personnel, was to abandon his employment.

When state of mind (or, in this case, sexual desire) is an element of a claim against a party moving for summary judgment, it is less fashionable to grant summary judgments since state of mind is inherently a question of fact which turns on credibility. See *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d. 1257 (5th Cir., 1991). Certainly, the Fifth Circuit has stated that a court is not precluded from granting summary judgment when state of mind is at issue. However, Louisiana's federal courts have emphasized that where intent and motive are relevant considerations in conjunction with an action and, therefore, a summary judgment motion, the court must be "vigilant to draw every reasonable inference from evidence in the record in the light most flattering to the nonmoving party." See, *International Shortstop, Inc.*, supra. See, also, *Bodenheimer v. P.P.G. Industries, Inc.*, 5 F.3rd 955 (5th Cir., 1993). With citation to the obviously inadmissible notes of the E.E.O.C. examiner who may or may not have recorded the statements of Joseph Oncale accurately, the defendants ask this court to resolve summarily all disputed questions of fact arising out of this claim and decide all questions concerning the motives, intentions and homosexual desires of the individual defendants in advance of trial. The court should reject this approach and allow the trier of fact to hear the claims.

(B) Inadmissibility of Evidence and Disputed Facts Relevant to Control and Liability

In support of their assertion that there are no material facts to be determined in conjunction with Joseph Oncale's quid pro quo sexual harassment claims, Sundowner states summarily, and incorrectly that "plaintiff does not allege that Lyons, Pippen or Johnson demanded that (he) engage in any sexual acts, nor does plaintiff allege that they linked any sexual demands to plaintiff's job performance or threaten him with repercussions if he refused any demand made upon him." Without citation to any indisputable facts which could possibly provide some foundation for these assertions, the entire factual fabric of Mr. Oncale's claim is simply disposed of by the defendants. It is submitted that this is not a proper approach a venue to a summary dismissal. The defendants' summary factual asserts [sic] are completely contrary to the deposition testimony of Joseph Oncale which was that he believed that he would have to endure the sexual assaults and attempted rapes if it was his desire to continue with his employment. These unresolved factual questions preclude an award of summary judgment.

Next, the defendants would pretermit trial of this claim by reference to the handwritten notes of an E.E.O.C. investigator, attached as Exhibit A to Sundowner's motion for summary judgment. As this exhibit is nothing more than an investigator's file notes, they constitute hearsay and, thus, are not admissible in support of this summary judgment motion. Federal Rule of Civil Procedure 56(e) will not allow sundowner's reliance on this inadmissible evidence. Plainly, the only relevance

of the document would be to prove the truth of the matters asserted therein. This is inadmissible hearsay evidence and, thus, cannot be weighed in favor of Sundowner's summary judgment motion.

Next, the defendants would have this court determine summarily the matter of Danny Pippen's right and power to exercise control over the terms and conditions of Mr. Oncale's employment. The movers attach an affidavit to the effect that, in accordance with Sundowner's hierarchy, Danny Pippen was not granted supervisory authority over Joseph Oncale's [sic]. Be this as it may, the deposition testimony of both Mr. Oncale and Mr. Pippen is that Mr. Pippen exercised de facto control over the conditions of Mr. Oncale's employment. For this further reason, summary judgment would be inappropriate on this issue.

III. APPLICABLE LAW AND ARGUMENT: Male-on-Male Hostile Environment Case Law

Joseph Oncale concedes, as he must, that few courts have directly explored or explained the rights of victims such as himself. Further, it is acknowledged that the Fifth Circuit Court of Appeals has gone out of its way to comment negatively upon "male-on-male" claims. In spite of this, summary judgment dismissing Mr. Oncale's action remains inappropriate for two reasons. First, a harassment claim is inherently a factual dispute and no court has ruled, as Sundowner would have this court rule, that the facts of a male-on-male claim are irrelevant and that, as a matter of law, all such claims must be

dismissed. Secondly, all of the cases relied upon by Sundowner can best be described as "horseplay" cases. None of the cases involved the touching and attempted homosexual intercourse involved in this dispute and none of the cases relied upon by Sundowner involved viable claims that the victim was being subjected to actual and threatened sexual abuse by a supervisor who controlled the terms and conditions of the victim's employment. These important distinguishing facts require that this action proceed to trial.

In *Polly v. Houston Lighting and Power Company,* 825 F.Supp. 135 (S.D. Tex. 1993) the court considered a sexual harassment claim brought by a male who alleged that during the course of his employment he was sexually harassed by other male employees with whom he worked as part of a traveling maintenance crew. The conduct complained of by Polly included the allegation that he was repeatedly called a "faggot," a "queer" and a "fat bucket of * * * ." Mr. Polly claimed that the defendants did, on one occasion, "expose their genitalia to him."

The district court, after full review of the facts, characterized the case as a "hostile environment claim." Further, it noted that the sexual behavior was perpetrated not by Polly's supervisors who had authority to affect tangible aspects of his compensation, terms, conditions, or privilege of employment but by co-employees who lacked authority. See *Polly* at pages 137, n.3 and 138. Further, the court found as a fact that the acts committed against Mr. Polly were not "in demanding sexual favors," but rather the acts committed were done with jealous or malicious intent. *Polly v. Houston Lighting and Power Company,* supra, at pages 138, n.4, 139.

Concluding that the case before it was only a hostile environment claim, and armed with the employee's admissions that the complained-of acts were committed out of jealousy or "horseplay," the court granted the employer's summary judgment motion and concluded that Mr. Polly could not maintain a cause of action for sexual harassment under Title VII. For present purposes, it is important to note two things: First, the court carefully reviewed the facts involved and the direct evidence of a lack of homosexual overtones. Secondly, the Court rules simply that Mr. Polly failed to advance sufficient facts in response to a summary judgment motion. The Court did not summarily dismiss the asserted cause of actions and cited approvingly the cases in which "male-on-male" claims were recognized. Further, the Court did not rule in favor of the employer in absolute terms, it did so on the facts.

Similarly, in the case of *Garcia v. Elf Autochem North America,* 28 F.3rd. 446 (5th Cir., 1994) the court was not presented with a sexual harassment claim brought by a worker who, like Joseph Oncale, was physically assaulted by an immediate supervisor under circumstances and with words that could reasonably be understood to evidence an actual desire to engage in a sexual act. Unlike Joseph Oncale, Mr. Garcia was not made to understand that the price of continued employment was submission to a male supervisor's violent sexual desires. Further, the determination in favor of the employer came only after full review of the facts.

The facts important to the *Garcia* case were that Mr. Garcia complained that a fellow worker, who was not Garcia's supervisor, *Garcia,* supra, at page 448, "made

sexual motions from behind Garcia." On the record presented, the Fifth Circuit affirmed the trial court's determination that Elf Autochem was not Mr. Garcia's employer for purposes of Title VII. It was on *this basis* that Elf Autochem was granted summary judgment. Further, the individual defendant, Locke, was dismissed from the claim because he was "a mere co-worker" who exercised no supervisory authority over Garcia. *Garcia*, supra, at page 451.

After finding that the trial court properly dismissed each of the corporate and individual defendants, the Fifth Circuit, in unnecessary dicta, concluded that "what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII." The importance of this approach for purposes of the summary judgment motion now before this court, is that this ruling shows that the Fifth Circuit was evaluating "what Locke did to Garcia," i.e. he stood behind the "victim" and made gestures. It seems that the Fifth Circuit's ruling, which came only after full review of the record, is simply that Title VII does not extent to "what Locke did to Garcia;" which can best be described as adolescent horseplay. The behavior of the individuals now before this court, by their own admissions, was not "simply horseplay." *Pippen Deposition Exhibit D; pages 22-32.*

The third case relied upon by Sundowner Offshore Services, Inc. in its summary judgment motion is the United States District Court for the State of Maryland's decision in the matter of *Hopkins v. Baltimore Gas and Electric Company*, ___ F. Supp. ___, 63 USWL [sic] 2420, (Md. 1994). The important background facts in *Hopkins* are that the plaintiff's sexual harassment suit was based

upon the following, limited facts: His immediate supervisor, the harasser, "made jokes and gestures of a sexual nature." Additionally, his supervisor sometimes said to him "you look so distinguished." Further, Mr. Hopkins complained that he was harassed because of the "strange look" which the supervisor had at times and because his supervisor allegedly said "something like orientation is subjective and gave him a peculiar look." On other occasions, the supervisor "made inquiries and comments" which plaintiff felt were embarrassing and "overly personal." *Hopkins*, supra, at pages 5-6.

The court in *Hopkins*, review the case law applicable to a Title VII sexual harassment claims [sic] and plainly characterized Mr. Hopkins' action as a "hostile work environment" claim. Thereafter the Court emphased [sic], first, that *"none of the alleged incidents of sexual harassment by (the individual defendant) involved implicit or explicit requests or demands for sexual favors." And, second, many of the incidents relied upon did not appear to have been "sexual in nature" and involved "essentially trivial conduct." And third, that the individual defendant never touched plaintiff in a sexual manner. Hopkins*, supra, at page 10. The court concluded that no reasonable jury could find on the record that the claimant was a victim of proscribed sexual harassment.

Again, this is a summary judgment determination that is far different than the one which Sundowner now asks this Court to make. The *Hopkins* court plainly did not dismiss the "male-on-male claim" simply as a matter of law. It reviewed all of the facts and found the claim to involve relatively trivial, non-sexual conduct. It further emphasized that the claim involved no implicit or explicit

demands for sexual favors. Mr. Hopkins, unlike Joseph Oncale, was not threatened with rape on some occasions and sexually touched on others while being assured that he could not escape this torment by reporting the abuse to supervisors. Mr. Hopkins, unlike Mr. Oncale, did not testify that he believed that he would be raped should he continue in his employment. The different fact patterns may well require a different result after trial. The *Hopkins* court's approach certainly requires that Mr. Oncale be allowed to proceed towards trial so that this court can fully consider the facts in the same manner they were considered in the cases Sundowner cites in support of its assertion that trial is unnecessary.

In short summary, careful review of the case law relied upon by Sundowner reveals first, every court dismissing a male-on-male sexual harassment claim did so after a thorough review of the facts. Sundowner, citing no facts, presenting no statement of uncontested facts, and citing none of the three depositions which have been taken, would have this court determine as a matter of law that a male could *never* sue successfully under sexual harassment theories. None of the cases stand for this proposition.

Secondly, two out of the three cases, *Polly* and *Garcia*, did not involve supervisory personnel who were clothed by the company with direct, actual authority to control the terms, conditions and duration of the victim's employment. The third case, *Hopkins* did not involve a supervisor who exploited his authority to sexually victimize the plaintiff. This is important as the cases cited in support of the summary judgment motion are based on the lack of these factors.

Lastly, none of the cases relied upon by mover are remotely similar to Mr. Oncale's claim that he was actually penetrated with a foreign object while being held by both a co-employee and a supervisor. None of the victims in the cited cases were assured by a direct supervisor, as Mr. Oncale was, that he would be a frequent victim of actual, sexual touching should he attempt to continue in his employment. Plainly, in all of the reported cases it was the absence of the facts now before this court that led to the denial of relief.

IV. QUID PRO QUO HARASSMENT: Tangible Employment Consequences

Under E.E.O.C. guidelines, actual harassment exists when, "submission to sexual conduct is made either explicitly or implicitly a term or condition of an individual's employment," or when "submission to or rejection of such conduct by an individual is used as a basis for employment decisions effecting such individual."

An actionable quid pro quo case does not require proof that the plaintiff's job was at stake. Less extreme adverse employment actions such as demotion or other disciplinary measures will suffice. See, generally, *Sowers v. Kemira, Inc.*, 701 F.Supp. 809 (S.D. GA. 1988).

For sexual harassment to be actionable under Title VII, the complained of conduct must be unwelcome and must affect a term of [sic] condition of employment. There are two types of sexual harassment claims recognized by the courts and the claimant does not necessarily assert one or the other with the presentation of his case. To the extent that Mr. Oncale's claim and the actions of

defendant are characterized by a loss of tangible economic benefits to the employee who rejected his supervisor sexual demands, it is a "quid pro quo" harassment case. The majority rule is that an employer is absolutely liable for acts of "quid pro quo" harassment by a supervisor who has plenary power to make employment decisions, and thus functions as a surrogate for the employer. See, generally, Larson *Employment Discrimination*, 2nd Edition, Section T41A.11.

Under the E.E.O.C. guidelines, 29 C.F.R. Section 1604.11, actionable harassment exists when "submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual's employment or when "submission to or rejection to such conduct by an individual is used as a basis for employment decisions affecting such individual."

The E.E.O.C.'s guidelines, 29 C.F.R. 1604.11 provide that harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, and (2) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sundowner concedes, as it must, that homosexual harassment violates Title VII. See, generally, *Joyner v. AAA Cooper Transport*, 597 F.Supp 537 (M.D. Ala. 1983). However, Sundowner then attempts to avoid the factual

questions inherent in this and all other quid pro quo cases, (i.e. what was said, what was the desire or intent of the supervisor involved, was the victim's perception that submission to the unwelcome sexual assault was implicitly, if not explicitly, a condition of continued employment reasonable, etc.) with two self-serving propositions. First, Sundowner asserts that inadmissible and unreliable note [sic] of an E.E.O.C. examiner resolves all questions of fact in favor of Sundowner so that the direct testimony of Joseph Oncale that he actually believed that he would be raped by his superior if he were to continue in his employment can be ignored. Second, Sundowner argues that the reported cases are distinguishable because the supervisors in those cases were "actual homosexuals" (however this was determined) as opposed to non-homosexuals (such as John Lyons?) who threaten homosexual sex and appeared to enjoy their violent, sexual assault upon another male. These assertions and the summary judgment motion which rests upon them must be rejected.

Whether John Lyons and the other individual defendants are homosexuals or heterosexuals who chose to homosexually violate Joseph Oncale is a fact question for this court to consider at trial. But this question is not determinative of the case. Sundowner seems to assert that summary judgment is proper because it has "proven" that its supervisors are not homosexual. This is not a proper matter for summary determination. Further, under what facts or legal theory is Joseph Oncale precluded form introducing evidence of the defendant's conduct and his perceptions of that conduct? How does one "prove" that another is or is not a homosexual other than

by presenting to the trier of fact all the details of the individual's conduct? The summary judgment argument advanced by Sundowner begs the central question: Is the issue whether the individual defendant's were "actual homosexuals" (whatever this means) as they attempted to penetrate Joseph Oncale and assisted each other in their efforts to touch Mr. Oncale with their penises, or is the issue whether under all of the facts Joseph Oncale reasonably perceived that the advances were based on sex and would have to be endured if he wished to continue in his employment with Sundowner?

In *Joyner*, supra, at 538, the limited facts were that a manager allegedly placed his hands on plaintiff's "private parts" and asked the plaintiff to engage in homosexual activities. The plaintiff refused and walked away. The plaintiff reported the incident.

Granting relief for the plaintiff, the court did not base its rulings on a factual determination that the victim's manager was, in fact, a homosexual. Instead, the court found that Mr. Joyner had satisfied the elements of quid pro quo harassment set forth in *Henson v. City of Dunee*, 682 F.2d 897 (11th Cir. 1982) when he established (1) that he was a male, i.e. a member of a protected class, (2) that he was subjected to unwelcomed sexual harassment and, (3) "since the evidence established the terminal manager's homosexual proclivities," the harassment of which Mr. Joyner complained was based upon sex. The court also found that the plaintiff satisfied the fourth element as the evidence was sufficient to show that Mr. Joyner's rejection of the homosexual overtures ultimately caused a tangible job detriment. Under law, therefore, the facts which must be tried in this case, and which cannot be

resolved summarily, include the nature and extent of the individual defendants' homosexual proclivities, the possible manifestations of these proclivities by the supervisors, the nature of the harassment to which Joseph Oncale was subjected, and whether the actions of the defendants reflected "homosexual overtures" which Joseph Oncale avoided only by resigning his employment. Mr. Oncale's claims cannot be dismissed, as Sundowner would have this court dismiss them, because the other cases, such as *Joyner*, "involved real homosexuals." Such analysis hinges upon factual questions which must be tried.

V. SUMMARY

Joseph Oncale advances a claim to recover for the sexual harassment he endured during the term of his employment with Sundowner Offshore Services, Inc. As a claim of this nature is inherently factual and must involve a comprehensive evaluation of the abuse to which Mr. Oncale's [sic] was subjected and an evaluation of his reasonable perceptions and responses to that abuse, see, generally, *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this motion for summary judgment should be dismissed in all respects. With regard to John Lyons, it is apparently conceded by Sundowner that Mr. Lyons exercised supervisory authority and control over Mr. Oncale. However, there is a dispute as to relevant facts with regard to Danny Pippen's power and authority over Joseph Oncale. With regard to Brandon Johnson, an unresolved factual question would be whether, and to what extent, this fellow worker conspired with the supervisors

to deprive Mr. Oncale of his right to a peaceful employment relationship and whether this conspiracy, if one exists, would allow for liability under law.

While Sundowner can cite some cases which show that the courts examine "male-on-male" claims vary carefully, none of these decisions announce a bright line rule that under no circumstances can a male advance successfully a claim under Title VII of the Civil Rights Act. Certainly, this is not true (as Sundowner appears to acknowledge) in quid pro quo cases.

Joseph Oncale was sexually assaulted, sexually touched and, in the process thereof, denied tangible benefits of his employment by direct supervisors who implicitly and explicitly conditioned Mr. Oncale's employment rights upon his willingness to submit to the manifestations of their violent sexual desires. Seeking a summary dismissal, the Employer essentially says two things: None of the facts matter because a male can never recover under Title VII, or, alternatively, to the extent a man might be able to recover, Mr. Oncale cannot, because no one involved was "a homosexual." These assertions, it is respectfully submitted, mischaracterize applicable law and are dependent upon factual determinations which must be made at trial. The summary judgment motion should be denied.

RESPECTFULLY SUBMITTED:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	**C.A. NO. 94-1483**
VERSUS	**JUDGE: SECT. T. MAG 4**
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	**MAGISTRATE: (C)**

****

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Plaintiff's Opposition to Motion for Summary Judgment has been mailed, first class postage prepaid and properly addressed to all counsel of record on February 27, 1995. Further, undersigned counsel certifies that the referenced pleadings were sent, via Airborne Express for delivery on March 1, 1995 to both the Clerk of Court and the presiding Judge.

Baton Rouge, Louisiana this 1st day of March, 1995.

/s/ Nicholas Canaday, III
NICHOLAS CANADAY, III

/s/ Andre P. LaPlace
ANDRE P. LAPLACE

ONCALE EXHIBIT "A"

[p. 1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VS.	NO. 904-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON	SECTION "L"
	MAG. 4
	MAGISTRATE (C)

Deposition of JOSEPH LAUREN ONCALE, given in the above-entitled cause, pursuant to the following stipulation, before Sandra P. DiFebbo, Certified Court Reporter, at the offices of Galloway, Johnson, Tompkins & Burr, 40th Floor, One Shell Square, New Orleans, Louisiana, on the 20th day of January, 1995.

* * *

[p. 58] A He could have been.

Q Do you recall him actually being there?

A No, sir.

Q Butch Edwards wasn't there, was he?

A No, sir. Butch Edwards stayed on the –

Q How about Danny Pippin, was he there?

A I don't think so.

Q What was the next incident of offensive touching?

A The shower.

Q Was that the same night?

A Yes, sir.

Q So going from the chronology, at least as we see it in the affidavit, that would have been the evening of October 26th?

A Yes, sir.

Q Tell me what happened.

A I was taking a shower when John Lyons and Danny Pippin jumped in the shower with me. Danny Pippin grabbed me, and John Lyons rubbed a bar of soap between the crack of my ass and told me, "Yeah, we know you talked to daddy about it, but we're going to fuck you anyway."

Q How big is that shower?

[p. 59] A I'd say it's three by three.

Q You said they jumped into the shower, or, I mean, did they like run in, or what happened?

A Surprisingly.

Q Was the curtain drawn?

A Oh, yes, sir.

Q And then what? Did they push the curtain back and run in?

A Yes, sir. Well, they didn't particularly push me, you know, push the curtain back. You can just walk through the curtain, you know, actually.

Q Again, Danny grabbed you; is that your testimony?

A Yes, sir.

Q How did he grab you?

A He grabbed me around my upper body, picking me up, and he wrapped his arms around my knees, the back of my knees where they would bend, and he kind of folded me.

Q So he lifted you completely off the ground?

A Yes, sir.

Q How much did you weigh at the time?

A About 125, 135, maintain.

[p. 60] Q So all three of you were in the shower. Mr. Pippin lifted you up off the ground. Then what happened?

A John Lyons grabs the bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me, you know, and –

Q Then what happened?

A Well, man, I struggled. I got away. I pushed Danny out of the shower. I pushed one of them out of the shower, and the other one got out. He seen that I was extremely mad.

Q Then what happened?

A I got the hell away from them, got dressed, and got away from them.

Q Did they just leave you alone at that point?

A That night.

Q I mean, what happened? Did they just stay in the shower and you ran out? What happened?

A They were still in the shower area when I got out.

Q Was there anybody else in the bathroom area [p. 61] at that time?

A There were several other people that seen it.

Q Who saw it?

A Pretty much everyone that was on our crew.

Q Was the whole crew in the bathroom, or were they out in their bunk room?

A They were in their bunk room.

Q So they didn't actually see it?

A The bunk meets right with the door. When you sit on your bunk, you can see everything that goes on.

Q Has anyone told you they actually saw what happened?

A Yes, sir.

Q Who?

A Bobby Guidry.

Q Anybody else?

A Jody Fontenot and Mark Robinson. They're the only ones that came to me and said, "Damn man."

Q When is the first time you complained to Mr. Lyons' supervisor that he was treating you improperly?

A Supervisor, meaning Butch?

* * *

[p. 64] Lyons' motivation, in your mind?

A To have sex with me, to rape me.

Q What happened after the shower incident?

A I stayed away from them.

Q Did you go to sleep that night? Is that pretty much the next thing that happened?

A I got very little sleep.

Q Did you go get in your bunk, and that was pretty much the end of it?

A That night, no. I did not get in the bunk after that happened. I got up. Well, I got out and got away from them, went downstairs. I just stayed away from them. I didn't like being around them. They scared me.

Q Do you know what day you terminated your employment with the Sundowner?

A I'm not exactly sure.

Q If some documents were saying it was around November 10th, do you have any reason to dispute that?

A No, sir. I figured it was around November.

Q Give me a time sequence as far as your work schedule was concerned after the shower incident. How many more days were you on

* * *

[p. 72] You can answer now.

THE WITNESS: As much as I can remember, yeah, I've told you, you know.

BY MR. BROWN:

Q Everything you can remember?

A At this time, you know.

MR. BROWN: I think that's all the questions I have.

EXAMINATION BY MR. LaPLACE:

Q Mr. Oncale, from your perspective, what did you believe Mr. Lyons' intentions were towards you?

A To rape me.

Q From your perspective, in your mind, what was Mr. Pippin's intentions towards you?

A To assist and/or help, you know, rape me, too.

Q In your mind, from your perspective, what was Mr. Johnson's intentions towards you?

A I think he plotted with John Lyons to do what they done to me.

Q Mr. Oncale, after checking a couple of notes on the break, and I appreciate [p. 73] counsel having a break, can you just tell – because it's unclear from the way you responded to Mr. Brown. Can you tell me why you left your job at Sundowner?

A I felt that if I didn't leave my job, that I would be raped or forced to have sex.

Q With who?

A Lyons and Pippin.

Q So in response to the questions that Mr. Brown asked you about did they ever tell you specifically you better have sex because we're going to fire you, that didn't occur?

A I felt that if I didn't get off the rig, that I would be sexually violated.

Q By your superiors?

A Exactly. John Lyons and Danny Pippin.

Q As I appreciate the scenario, from your work schedule, is that after this last week in October, when these three incidents, physical incidents, took place, you went home for seven days, and then you came back for seven days more, didn't you?

A Six days. I figured they would be reprimanded, fired, do something to these [p. 74] guys. They never did. And I felt that I was still being sexually harassed by the verbal abuse they was – I don't know how to put it to tell you. They were making sexual advances toward me verbally, and I felt that nothing had changed.

Q Predominately, who made verbal sexual suggestions to you?

A John Lyons.

Q Can you give us some examples of what he said to you on your last tour? By your own testimony, no physical touching took place. What did he say to you?

A "You tol[illegible] your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway."

Q Did you know what the reference to "your daddy" meant?

A Yes, sir, I knew what it meant.

Q Tell us, for the record.

A It means the toolpusher.

Q Did you have any conversations with Val Hohen that last week of your work with Sundowner regarding these verbal suggestions Mr. Lyons was making?

[p. 75] A I asked him what had been done.

Q And his response was?

A That they were going to work on it. And I told Val, I said, "No, you know, ya'll got to do something."

Q Well, in your mind, did you quit over some kind of hassle with the smoking procedures on the rig?

A No, sir.

MR. LaPLACE: That's all I've got.

BY MR. BROWN:

Q I forgot to ask one question. What benefits did you have while working with Sundowner as far as health benefits or anything like that?

A If I'm not mistaken, some kind of medical insurance.

Q Was there a 90-day probationary period for that?

A Yes, sir, I think so, but I'm not for sure if it had kicked in or not, but that's what was offered, you know.

Q Other than medical benefits, do you know personally, as you sit here today, of any

* * *

ONCALE EXHIBIT "B"

STATE OF LA CASE NAME Oncale

CITY/COUNTY OF _____ CASE NUMBER 270920368

AFFIDAVIT

I, Joseph L. Oncale (Name) being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 21 years of age, my gender is Male (sex) and my racial identity is White (race).

I reside at 23350 DEMON WATSON ROAD (Number/Street)

City of MT. HERMAN, County of WASHINGTON,

State of LA, Zip Code 70450.

My telephone number is *(including area code)* (504) 839-3842.

My complaint is against SUNDOWNER OFFSHORE SERVICES, INC. which is (Name of Union/Company/Agency)

located at 2707 NORTH LOOP WEST, SUITE 510 (Number/Street)

in HOUSTON (City) TX (State) 77008 (Zip)

My job classification is *(if applicable)* ROUSTABOUT. (job title)

My immediate supervisor is *(if applicable)* John Lyons, (Name)

Crane Operator (job title)

I was employed by Sundowner Offshore Services, Inc. in about August of 1991. I worked as a Roustabout and earned $7.00 per hour. Sundowner Offshore Services, Inc. works over old wells, putting new pipe in the hole, clean out the wells and do various other duties as required by the clients for which Sundowner does contract work. I was hired through Sundowner's Houma, LA office and worked on Ship Shoal 266-A platform for Chevron, USA.

Almost upon my being hired, I was verbally abused by John Lyons, crane operator for Sundowner. He would call me an SOB and would curse me using other words. He cursed the other two Sundowner Roustabouts also. They were Jody Fontenot and Bobby Guidry.

I worked seven days on the platform and seven days off. We worked on platform A and slept on platform B. On or about October 25, 1991, my crew which consisted of Danny Pippen, driller; Brandon Johnson, Roughneck; Mark (LNU), derrick hand; another Roughneck named Dave (LNU); Lyons; Guidry; Fontenot and me were on our way to platform B by boat. Danny Pippen grabbed me holding my arms down and where I couldn't get away from him and Lyons put his penis in the back of my head. It was out of his pants. I was turning my head to see what was going on and I could see what he was doing. Everyone else on the crew saw this. He said that he was going to "fuck me in my behind". I kept struggling and finally got loose and asked him to please quit. He stopped at that point. The very next day, when we had left platform A and were at B, we had just been picked up by the personnel basket that the crane uses to pick personnel up off the boat and place on the platform. Before I could do anything, Brandon Johnson grabbed me and was squeezing me and holding me where I couldn't move. Before he could let me go, Lyons took his penis back out and put it on my arm. The very same night while I was taking a shower, Danny Pippen and John Lyons got in the shower with me, Danny grabbed me to where I couldn't move and Lyons rubbed the bar of soap between the cheeks of my behind and told me that they were going to "fuck me in my behind". I threw Danny out of the shower and

Lyons got out. They asked me "What's wrong, you don't want us taking a shower with us?"

I talked to Valent Hohen, Jr. who is the Safety Compliance Clerk for Sundowner. I talked to him immediately after the first incident. He told me that they picked him all the time too and called him, "Valene, Valene the Rig Queen" but he didn't take any other actions. This would have also been considered horseplay which is considered a reason for immediate termination.

Danny and John Lyons are both considered supervisors. Danny is the supervisor over the crane operator and all below him. He should have reported it to the Toolpusher but he was in on it. The Toolpusher is Butch Edwards. Most of the time, he stayed on platform A. He never went to B platform.

On November 10, 1991, I got so fed up, I couldn't sleep because I was afraid that they would do something to me, I couldn't fight, and I felt disgraced. On this day, we were working on a mud shaker electric motor. The toolpusher told me to clean the breaker and put it back in. I finished doing what he had told me to do. I looked to where Lyons and the other two roustabouts were working on the motor. They were in each other's way because the motor was so small. I went to smoke a cigarette. When I got back. Lyons asked me if I had gone to smoke a "fucking cigarette". I told him that I had and that there wasn't enough room for me to work with them and I was finished with what the Toolpusher had told me to do He told me never to do anything, use the

Text Continued on Attached Sheet(s)

I have read and had an opportunity to correct this Affidavit consisting of 4 handwritten ___ typed X pages and swear that these facts are true and correct to the best of my knowledge and belief.

/s/ Jody L. Oncale
SIGNATURE

Subscribed and sworn to before me

this 5th day of December 1991 .

/s/ Frances M. Watson
(504) 589-6034

Dec 5 13:08 1991 CP Initials SLD Chg #270920368, Attachment Page 1

Equal Employment Opportunity Commission
Affidavit, Additional Text

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bathroom, nothing without asking him permission. He told me to go to the SCR room (I'm not sure what that stands for but it's a room where we switch the generators and all the electrical equipment gets its power) and turn on a breaker that went to the mud motor. I turned to ask him which breaker and he told me that he didn't ask me all that "shit" that he had just told me to turn on the "goddam" breaker. I didn't know which breaker it was. I turned to ask him the same question. Before I could get the whole question out of my mouth, he told me the same thing and called me a stupid "sob". I asked him why he had to talk to me like that. At this time, I was very angry. I asked him why he couldn't talk to me nicely and he repeated what he had said before. I told him that if he

couldn't talk to me like I was a human being, I wouldn't do anything for him. He then said that he would "run my ass" off because he couldn't put up with a "smartass". I told him that the only "smartass" out there was him. He said that he was going to run me off and I told him that I quit.

I went to the Toolpusher and told him everything. He asked me if I could just hang on until the end of crew change which was the next day and on the next hitch he would put me on the opposite crew. I told him that I would try but I wanted him to keep me away from Lyons because I couldn't handle it anymore and felt like I was going crazy. I felt that if he did or said anything to me, I would hit him. He said that he would talk to Lyons and that there were three other crane operators in the yard and if he didn't straighten up, he would put him in the yard. I went downstairs and he called Lyons up and talked to him. When Lyons came down, he never said anything to me but talked to the other two roustabouts and told them that I wouldn't make it to the next crew change, that anything I did, he was going to run me off. He went to the galley and when Jody Fontenat told me this, I knew that if I didn't quit under the circumstances that had happened, they would say that I was only saying that I was sexually harassed because I was run off.

I went back to the toolpusher's office and told him that I wanted my pink slip and that I wanted it stated on there exactly the reasons for me quitting. He said okay and told me to tell Hohen to fill out my pink slip and get ready to do. I told Hohen and he filled out my pink slip saying that I voluntarily left due to sexual harassment and verbal abuse.

I left platform A and when I got to B, the toolpusher called me and said that the pink slip was no good and to give it back to Hohen because he didn't sign it. I told him that I wouldn't give it back because it was the only proof that I had. I told him that I would give it back when he gave me another pink slip signed by him saying the same reasons that I had quit, I would give it back. The next morning at 7:45 am, Hohen called me at home and asked me if there was any way that I would drop the sexual harassment part from the pink slip and keep the verbal abuse because a lot of people were going to get in trouble and some were going to lose their jobs and they were also going to loose [sic] their five year contract with Chevron if this went anywhere. I told him that I wanted the same thing on a second pink slip that I had on the first one before I would tear the first one up. He just said "Bye" and slammed the phone down.

Danny Pippen had kissed a galleyhand for Sundowner (Name Unknown) and he told Ben (LNU) who works for Chevron, USA as the company man. As company man, he is in charge of everything that goes on on the platform. This happened about the 7th or 8th of November, 1991. I was in the office when the galleyhand came in to complain. He also complained about Lyons telling him that he "loved him" and wanted to "fuck him in his butt". The next morning, in the safety meeting, he told Lyons and Pippen not to mess with the galleyhand anymore, that he was new, he was green to the field and he didn't know how it was offshore. That's all he said.

ONCALE EXHIBIT "C"

[p. 1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VS.	NO. 904-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON	SECTION "L"
	MAG. 4
	MAGISTRATE (C)

Deposition of BRANDON JEFFERY JOHNSON, given in the above-entitled cause, pursuant to the following stipulation, before Sandra P. DiFebbo, Certified Court Reporter, at the offices of Galloway, Johnson, Tompkins & Burr, 40th Floor, One Shell Square, New Orleans, Louisiana, on the 20th day of January, 1995.

* * *

[p. 41] THE WITNESS: What is the question? I don't remember.

MR. LAPLACE: Read back to him.

(Court reporter read back.)

THE WITNESS: What do you mean by harassment?

BY MR. LaPLACE:

Q Okay. I'll start right there then. Did you ever hear Mr. Pippin or Mr. Lyons use profanity directed towards Mr. Oncale?

A They cussed him, cussed me, you know.

Q I'm sorry, sir?

A I've heard it towards him and towards others, too, towards me.

Q Tell me what you heard toward him, sir, by Mr. Pippin and Mr. Lyons.

A Verbatim? I don't remember word for word. That's just how they – you talk out there.

Q Well, give me some examples, sir.

A Saying – like he would call him – we called him Termite, you know.

Q You called him Termite?

[p. 42] A Just about everybody on the crew.

Q Well, why did you call him Termite?

A That's what we all called him.

Q Well, do you know where that name originated? Who started using it?

A I don't recall that.

Q Well, how did you know to call him Termite?

A I would hear other people call him that.

Q Well, did you ever witness Mr. Lyons, in his interaction with Mr. Oncale, pull his penis out and put it on his head or arm?

A No, sir.

Q You didn't hold Mr. Oncale down when Mr. Lyons put his dick on him?

A No. I grabbed him and pulled him off the personnel basket, about two foot. And I held him right there, and he never pulled it out. He said he was going to, and I told him, when I let him go, I would never let anybody do that to anybody.

Q Well, let's talk about that. When did this occur, to the best of your knowledge, this incident about the personnel basket and somebody's going to pull their dick out?

A I don't remember any dicks or anything.

[p. 43] Q Who was present besides yourself and Mr. Oncale?

A I don't remember.

Q Who was the guy who was supposed to pull his dick out?

A John Lyons.

Q Did Mr. Lyons ever have a habit of threatening to pull his dick out on people while working offshore on the rig?

A No.

Q You never heard him say he was going to put his dick on somebody?

A No.

Q Had you ever heard him tell other employees that he wanted to fuck them?

A No.

Q You were never personally present when any of that took place?

A None of what you just said, no.

Q Well, Mr. Oncale has filed a suit against you individually for being present when he was being held, and alleges Mr. Lyons took his penis out of his pants and laid his penis upon Mr. Oncale's body. You say that didn't occur?

[p. 44] A That did not occur.

Q Mr. Oncale is incorrect?

A That's correct.

Q Why don't you tell me your version of what happened in this incident, although you don't recall the exact date, what happened with the personnel basket. Tell my how it started.

A They left you off the boat with – he was coming down onto the platform. I was there. They left the boat. We was all bullshitting. He was hollering. He got about two or three feet off the deck, and I picked him up, grabbed him, took him off of it, and I was holding him. And then John said he was going to – to hold him there, I'll put my dick on him. And John walked toward him. I let him go, and I told him I wouldn't let anybody put – do anything – do that to anyone.

Q Well, is that the first time you ever heard Lyons say he was going to put his dick on somebody?

A Yeah. That was the only time.

Q You never did see him do that to anybody [p. 45] else in the crew?

A No.

Q You never heard him threaten to do it?

A No.

Q Did you ever see Mr. Lyons put his hands in his pants like he was going – and massaging his genitalia and pull it out to show it, put it in somebody's face?

A Put what in somebody's face?

Q His hand, after putting – after rubbing himself and put it in somebody's face saying, "This is what it smells like. You want to know what it's going to feel like shortly?" You never heard him say that?

A No.

Q You never saw him do it?

A No.

Q Now, you said that ya'll were on the deck bullshitting around, and that Mr. Oncale was hollering. What was he hollering about?

A We was all off tour. We always – we was at the platform, and he messed with us, he was messing with us, with everybody. We all messed around, you know, on our way

• • •

[p. 53] A No.

Q Are you aware of an incident where Mr. Brumfield was held down and hickeys were placed on his neck?

A I was aware of that.

Q Were you present when that occurred?

A Yes.

Q Please describe what occurred.

A They was – just held him down, and they put hickeys on him.

Q Who were the persons holding Mr. Brumfield down?

A John Lyons.

Q What about Danny Pippin, wasn't he there, also?

A We was all in the same room. We all slept in the same room together.

Q Did you help hold Mr. Brumfield down?

A I might have.

Q What was the purpose of restraining Mr. Brumfield?

A He was going – he was going in to get married that week, and –

Q And?

A And just another way of messing with [p. 54] somebody.

Q You mean as opposed to putting – someone putting their dick on you, they'd also put a hickey on your neck as another way of messing with you?

A No. Ain't nobody put their dick on nobody.

Q To the best of your knowledge?

A To the best of my knowledge.

Q You never actually saw that occur; is that correct?

A That's correct.

MR. BROWN: Asked and answered.

BY MR. LaPLACE:

Q So who applied the hickey to Mr. Brumfield's neck?

A John, I think.

Q How did he do that?

A Sucking on it.

Q So how many people did it take to hold Mr. Brumfield down while Mr. Lyons sucked on his neck?

A I don't remember.

Q More than one?

A One, two.

[p. 55] Q And you were one of these people, right?

A I could have been holding his feet. It's been so long back.

Q Was Mr. Brumfield enjoying himself?

A No.

Q As a matter of fact, he was quite upset about it, wasn't he?

A Then he started laughing about it.

Q In the time Mr. Brumfield was physically being restrained, and Mr. Lyons was sucking on his neck, he was not laughing, was he, sir?

A No, sir.

Q In fact, he was screaming to be let go, was he not, sir?

A I don't remember any screaming.

Q He was demanding to be let go; is that not correct?

A That is correct.

Q Why didn't you let him go?

A I let go.

Q After the hickey was on his neck?

A When he started screaming, hollering, I turned around and walked away. I was still in the same room.

* * *

[p. 75] Q So you don't know if he ever made any complaint to Sundowner personnel about being physically harassed in a sexual nature?

A No.

Q Do you consider holding a man down and restraining his movements while somebody else sucks on his neck a physical assault?

MR. BROWN: I object to the form. It calls for a legal conclusion and calls for testimony in an area of which proper predicate has not been laid as to this witness. You can answer it.

THE WITNESS: I don't really know what you were saying again.

BY MR. LaPLACE:

Q Do you consider fellows restraining someone against their will when their neck is getting sucked on a physical assault?

MR. BROWN: Same objection.

THE WITNESS: Oh, that's – you would have [p. 76] to be out there, you know.

BY MR. LaPLACE:

Q Well, I'm out there right now. If I jump on you, hold you down, and this man sucks on your neck, is that going to be a physical assault to you, sir?

MR. BROWN: Objection.

THE WITNESS: Strangers?

BY MR. LaPLACE:

Q Period, sir, the activity.

A Yes.

Q That's a physical assault, isn't it?

A Yes.

Q Just like Mr. Brumfield was a physical assault. He didn't give you permission to hold him down, did he?

A No.

Q He didn't give you permission to suck on his neck, did he?

A No.

Q He didn't like it, did he?

A No.

Q But you participated in it anyway, didn't [p. 77] you?

A Yes.

Q After Mr. Oncale left the employment of Sundowner, you know he filed a complaint with the EEOC?

A Who?

Q Mr. Oncale.

A No.

Q Have you ever been asked to give a written statement as to your version of the facts that happened at Mr. Oncale's employment working offshore for Sundowner?

A No.

Q Did you ever give any affidavits to the EEOC regarding his allegations against you for sexual harassment?

A No.

Q Did Sundowner come to you after Mr. Oncale filed his complaint with the EEOC and ask you to give a written statement?

A No.

Q Was there any inquiry or investigation by Sundowner Services after Mr. Oncale left as to the nature of why he left?

A Not to my knowledge.

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ONCALE EXHIBIT "D"

[p. 1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VS.	NO. 904-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN AND BRANDON JOHNSON	SECTION "L"
	MAG. 4
	MAGISTRATE (C)

Deposition of DANNY JOE PIPPIN, given in the above-entitled cause, pursuant to the following stipulation, before Sandra P. DiFebbo, Certified Court Reporter, at the offices of Galloway, Johnson, Tompkins & Burr, 40th Floor, One Shell Square, New Orleans, Louisiana, on the 20th day of January, 1995.

* * *

[p. 22] Q And he was transferred to another Sundowner operation?

A Yes, sir.

Q Is he still employed by Sundowner?

A No, sir.

Q Do you know where he is employed today?

A No, sir.

Q Have you seen him recently?

A No, sir.

Q Have you seen him since he left Sundowner?

A No, sir.

Q So, as I appreciate it, you worked on the same crew and you bunked in the same bunk room; is that correct?

A Yes, sir.

Q And you were both supervisors of your own portion of the Sundowner crew?

A Yes, sir.

Q Did you ever see Mr. Lyons take his dick out of his pants and put it on any co-workers?

A No, sir.

Q Mr. Oncale alleges that on a boat trip out to 266-A, in October of 1991, you physically restrained him

while John Lyons [p. 23] put his dick on the back of his head. Did that incident take place, sir?

A No, sir.

Q Have you ever physically restrained Jody Oncale?

A No, sir.

Q Never at all?

A Never.

Q Didn't put your hands on Jody Oncale?

A Yes.

Q Please describe that touching you had with Mr. Oncale.

A I grabbed him on his butt occasionally.

Q And why was that?

A Walk by, just goose him a little bit.

Q What was the motivation for doing that?

A None, really.

Q So it's your testimony that you have never seen Mr. Lyons remove his penis from his pants and place it on a Sundowner employee's body?

A No, sir.

Q From the time you worked with him?

A No, sir.

Q So you've never seen it; is that correct?

[p. 24] A That's correct.

Q Have you heard him making verbal statements to employees regarding I'm going to fuck you or I'm going to get you?

A No, sir.

Q You never heard him say it?

A No, sir.

Q You've never worked in concert with him to physically restrain or touch other Sundowner employees?

A No, sir.

Q Did you ever see him intimate to any galley hand that he was going to fuck them?

A No, sir.

Q Have you ever heard him say that?

A No, sir.

Q Ever see him reach down and rub his crotch in front of other Sundowner employees and say he was going to whip it out and show them what it looked like?

A Not that I can recall.

Q Well, does that statement surprise you of Mr. Lyons' behavior?

A No.

Q How would you describe Mr. Lyons' [p. 25] personality, from a co-worker's standpoint, having worked with him and bunked with him for a long period of time?

A As a co-worker, he was a good supervisor. He knows his job. And he is always giving everybody a fair chance, all the guys that ever worked with us.

Q What about putting – what about physically putting his hands on people and acting in a sexual manner with them? People meaning other male employees offshore, putting his hands on their rear ends, their crotches, or physically restraining them and sucking on their neck?

A I don't understand that question.

Q Have you ever seen him put his hands on a co-worker's rear end?

A Yes, sir.

Q Have you ever seen him put his hands on a co-worker's crotch, in the genital area?

A I seen him touch them there before, not actually grab them.

Q You witnessed the incident involving Mr. Brumfield where he was held down and Mr. Lyons sucked on his neck?

[p. 26] A Yes, sir.

Q Do you consider that appropriate employee behavior?

A No, sir.

Q Were you in the room when it occurred?

A Yes, sir.

Q Did you participate in restraining Mr. Brumfield?

A No, sir, I didn't restrain him.

Q You didn't participate in restraining him; is that correct?

A That's correct.

Q But you were present?

A Yes, sir.

Q Did you make them stop?

A No, sir.

Q In your capacity as driller, could you have made them stop?

A Yes, sir.

Q In your capacity as driller, if they would not have stopped upon your direction, could you have fired them?

A I could have brought to it [sic] my supervisor's attention.

Q And recommended termination?

[p. 27] A Yes, sir.

Q Because that kind of behavior is inappropriate offshore, isn't it?

A Yes, sir.

Q It's inappropriate period, isn't it?

A Yes, sir.

Q Just like a hypothetical allegation of people putting their penis on a co-worker?

A Yes, sir.

Q You were here for Mr. Johnson's testimony. He doesn't think that those types of allegations, of someone being physically restrained, having a penis placed on them, that's – he said that's not what living offshore is all about, is it?

A No, sir.

Q It's not horseplay, is it?

MR. BROWN: Object to the extent that it calls for a legal conclusion.

BY MR. LaPLACE:

Q That type of activity, being physically restrained, having a penis placed on your body, that's not horseplay, is it?

A I don't think it is.

[p. 28] Q If someone physically retrains you, and someone puts a penis on you, how would you react, sir?

A There would be a fight.

Q Why would that be, sir?

A Because I don't want nobody putting that on me.

Q Fine, sir. But you categorically dispute Mr. Oncale's allegation that on the boat between – on the way out to 266-A that you physically restrained him and let John Lyons put his penis on the back of his head?

A I dispute it?

Q Yes, sir.

A Meaning – what does that mean?

MR. BROWN: Do you agree or –

BY MR. LaPLACE:

Q Deny or dispute it?

A I deny it.

Q It never occurred?

A Never.

Q You never saw Mr. Lyons put his penis anywhere on Mr. Oncale?

[p. 29] A No, sir.

Q Now, as I appreciate your testimony, Mr. Oncale's work assignments were dictated and directed by Mr. Lyons?

A Yes, sir.

Q But you could also direct him to do something for you, correct?

A Correct.

Q He was on the crew as a roustabout, so if you needed something done, you could call him over there to have it done, as long as it didn't interfere with your drilling activities, it required experience and knowledge, correct?

A Correct.

Q I'm not saying you would turn your drilling operation over to Mr. Oncale. I'm saying if you needed

something done right quick, something brought to you, you could tell him to do it, and it was his responsibility to respond immediately; is that correct?

A Yes, sir, he was one of them.

Q Who was Val Hohen?

A He was our safety compliance clerk.

Q Do you know what his job description [p. 30] entailed?

A He would oversee all the safety meetings and check all the safety equipment on the rig.

Q Are you aware of a safety meeting that took place where Mr. Hohen gave instructions to or warnings to Sundowner employees to stop physically harassing each other in a sexual manner, i.e. grabbing, holding, or in any way overtly acting in a sexual nature to co-workers?

A I think I recall a safety meeting.

Q Tell me what you recall.

A Basically what you said, you know. Val said that, you know, that we didn't need any childlike playing, or playing, grabbing people on the rear end or thumping anybody on the rig.

Q Or restraining them physically and putting your dick on them?

A I don't remember that.

Q But Val would be the person to instruct the employees to stop certain behavior as they were considered inappropriate offshore; is that correct?

[p. 31] A More or less.

Q Well, you wouldn't – you were in the safety meeting yourself. You could have said I agree with that, you need to stop doing that, or dispute that it even took place.

A I could agree with it. I mean, you know, if it took place.

Q Well, do you know why Mr. Hohen was giving this instruction to people?

A No, sir.

Q Were you aware Mr. Brumfield made complaints to him about being physically restrained and having his neck sucked on?

A No, sir.

Q Did you know Mr. Oncale had made complaints to Mr. Hohen about overt sexual touching of his body by other co-workers?

A No, sir.

Q Was Mr. Edwards present at that safety meeting when this was discussed?

A I don't recall.

Q Was Mr. Edwards usually involved in the safety meetings?

A Yes, sir.

[p. 32] Q How often would a safety meeting occur, sir?

A Once a day.

Q Every 12 hours, usually before a new shift started; is that correct?

A Yes, sir.

Q To kind of get the crew up to speed on what ya'll – the first shift had just finished doing, what they're expected to do, how to go about doing it?

A Correct.

Q That's a good way to operate the rig, isn't it?

A Yes, sir.

Q But employee misconduct among each other also affects safety, doesn't it?

A Yes, sir.

Q Especially the kind that causes tension among the employees; isn't that correct, sir?

A Correct.

Q Were you aware of tension between Mr. Oncale and Mr. Lyons when he worked offshore between August of '91 and November of '91?

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE

VERSUS

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON

JUDGMENT

(Filed March 24, 1995)

The Court having granted the motion for summary judgment of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson, and against plaintiff, Joseph Oncale, dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 23nd day of March, 1995.

/s/ G Thomas Porteous
G. Thomas Porteous, Jr.
United States District Judge

MINUTE ENTRY
PORTEOUS, J.
MARCH 23, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSEPH ONCALE	CIVIL ACTION
VERSUS	NO. 94-1483
SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON	SECTION "T" (Filed March 24, 1995)

Before the Court is Defendants' Motion for Summary Judgment. Plaintiff, Joseph Oncale, has filed opposition. This motion came before the Court for hearing on March 8, 1995.

Background

Plaintiff was employed as a roustabout by Sundowner Offshore Services, Inc. ("Sundowner") for several weeks in November of 1991. Plaintiff filed this suit for damages against Sundowner and three male individuals employed by Sundowner, John Lyons ("Lyons"), Danny Pippen ("Pippen") and Brandon Johnson ("Johnson"), alleging violations of the Civil Rights Act, Section 703(a)(1) of Title VII, and 42 U.S.C. 2000(e)-2(a)(1). Specifically, plaintiff seeks reinstatement to his former position or to a similar position, or in the alternative, damages resulting from the alleged sexual discrimination and

harassment he experienced while employed by Sundowner.

Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Fifth Circuit has explained that "[t]he Supreme Court has defined material facts as those that will affect the outcome of the lawsuit under governing law." *Meyers v. M/V Eugenio C.*, 919 F.2d 1070, 1072 (5th Cir. 1990), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Plaintiff's Complaint Does Not Give Rise to a Title VII Violation

Plaintiff's complaint alleges specific physical acts and verbal assaults perpetrated against plaintiff by Lyons, Pippen and Johnson. These acts and assaults, if proven, would constitute outrageous conduct by the defendants which would be actionable under Louisiana law.[1] However, plaintiff's complaint in this matter only alleges violations of Title VII, and the Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII. *See Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994).

The issue presented to the Fifth Circuit in *Garcia* was whether the district court erred in granting summary

[1] The Court is suggesting that plaintiff could have timely brought a state action.

judgment in favor of the defendants[2], dismissing Garcia's claim that he had been sexually harassed by a male coworker during his employment, in violation of Title VII. Affirming the grant of summary judgment, the Fifth Circuit explained that Garcia was limited to seeking equitable relief because the provisions of the Civil Rights Act of 1991 providing for damages were not retroactively effective as to his claim.[3] However, the Court continued its analysis, ruling that:

> Garcia's Title VII claim was also properly dismissed because he did not establish a prima facie case against any of the defendants.

Id. at 450. The Court explained that "Title VII prohibits an 'employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.' " *Id.* Section 2000e(b) defines an employer as "a person engaged in an industry affecting commerce . . . and any agent of such a person. . . . In this Circuit, we have accorded the phrase 'any agent' a liberal construction. . . . ". *Id.* at 451. The "liberal construction" has been extended to include immediate supervisors who participate in the decision-making process that forms the basis

[2] Named as defendants in the *Garcia* suit were the parent company of Garcia's employer, the plant manager, and the plant foreman.

[3] Because no further incidents of harassment occurred after Garcia complained to his supervisors, and because Garcia continued in his employment with Seagraves Oazark, equitable relief was inappropriate, and damages were unavailable.

of the discrimination. However, "[t]here can be no liability under Title VII . . . 'for the actions of mere co-workers.' " *Id.* (citation omitted).

Although the *Garcia* court found an independent basis to affirm the grant of summary judgment as to each defendant, it concluded as follows:

> II. Sexual Harassment
>
> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

Id. at 451-52. Plaintiff argues that the above quoted language is dicta, however the Court disagrees. Although the *Garcia* court articulated other grounds to support its affirmance of summary judgment, it included the above quoted language and explicitly stated that summary judgment "was proper on this basis also." Following the clear directive of the Fifth Circuit in *Garcia*, this Court is compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.

In addition, the Court finds that defendants Pippen and Johnson cannot be considered plaintiff's employer under Title VII, further supporting the Court's ruling granting summary judgment. *See* Affidavit of Edward M. DuBroc, attached to defendant's motion for summary judgment.[4]

Accordingly, finding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, defendant's motion for summary judgment is hereby *granted*.

/s/ G Thomas Porteous
G Thomas Porteous, Jr.
United States District Judge

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[4] Mr. DuBroc, the personnel director for Sundowner Services, Inc., states in his affidavit that plaintiff's direct supervisor on the rig would have been Lyons. Pippen, a driller, was the direct supervisor of derrick hands and floor hands, not of roustabouts. Johnson was a floor hand, and his supervisor was Pippen.

Joseph ONCALE, Plaintiff-Appellant,

v.

SUNDOWNER OFFSHORE SERVICES, INC., John Lyons, Danny Pippen, and Brandon Johnson, Defendants-Appellees.

No. 95-30510.

United States Court of Appeals,
Fifth Circuit.

May 20, 1996.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, DUHÉ, and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge:

Appellant Joseph Oncale filed this suit against Sundowner Offshore Services, Inc., ("Sundowner"), John Lyons, Danny Pippen and Brandon Johnson, alleging that he had been sexually harassed during his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court granted summary judgment in favor of the defendants and dismissed Oncale's case. Because our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), holds that same-sex harassment is not cognizable under Title VII, we affirm.

BACKGROUND

Joseph Oncale was employed by Sundowner on an offshore rig from August to November 1991. Oncale filed this Title VII action against Sundowner, John Lyons, his Sundowner supervisor, and Danny Pippen and Brandon Johnson, two Sundowner co-workers, alleging sexual harassment. Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises. Oncale alleges both *quid pro quo* and hostile work environment sexual harassment.[1] Oncale quit his job at Sundowner soon after the shower incident.

The district court granted summary judgment on Oncale's Title VII claim, relying upon our statement in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), that harassment by a male supervisor against a male subordinate does not state a claim under Title VII. Thus, the court concluded that it was "compelled to find that Mr. Oncale, a male, has no cause of action under Title

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[1] Sexual harassment in the workplace violates Title VII if it constitutes *quid pro quo* harassment, i.e., a supervisor conditions job benefits either explicitly or implicitly on an employees participation in sexual activity, *see Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir.1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987), or if it alters an employee's working conditions by creating a hostile work environment because of the employee's sex. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

VII for harassment by male co-workers." Finally, the court found that Oncale's co-workers, Pippen and Johnson, could not be held liable as "employers" under Title VII.

DISCUSSION

Precedential Value of Garcia

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1). Appellant and the Equal Employment Opportunity Commission (as *Amicus Curiae*) argue that Title VII's prohibition against sex discrimination and the Supreme Court's sexual harassment decisions are formulated in gender-neutral terms, and therefore, prohibit all discrimination *because of sex*, whether it is discrimination against men or women. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (referring to "victims" of sexual harassment, and not just female victims, and adopting "reasonable person" standard for measuring offensiveness of work environment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (" 'Surely a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.' ") (emphasis added) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir.1992)). Under this reading of the statute, so long as the plaintiff proves that

the harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant.

This panel, however, cannot review the merits of Appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir.1994), and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts,[2] we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991).

This Circuit's same-sex Title VII jurisprudence began with *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir.1993) (per curiam) (unpublished), *cert. denied*, ___ U.S. ___, 115 S.Ct. 311, 130 L.Ed.2d 274 (1994). Although the holding in that case is not entirely clear, it appears that the Court

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[2] These cases include *Williams v. District of Columbia*, 916 F.Supp. 1, 8 (D.D.C.1996); *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502, at *4-5 (S.D.N.Y. Nov. 1, 1995); *King v. M.R. Brown, Inc.*, 911 F.Supp. 161, 167 (E.D.Pa.1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F.Supp. 335, 338 (E.D.Va.1995); *Raney v. District of Columbia*, 892 F.Supp. 283, 286 (D.D.C.1995); *Griffith v. Keystone Steel & Wire*, 887 F.Supp. 1133, 1136 (C.D.Ill.1995); *E.E.O.C. v. Walden Book Co., Inc.*, 885 F.Supp. 1100, 1101 (M.D.Tenn.1995); *Roe v. K-Mart Corp.*, 1995 WL 316783, at *1 (D.S.C. March 28, 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545, 1550 (M.D.Ala.1995); *McCoy v. Johnson Controls World Services, Inc.*, 878 F.Supp. 229, 231 (S.D.Ga.1995).

ruled that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex. Next, in *Garcia*, we extended *Giddens* to bar all same-sex sexual harassment claims:

> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92-8533 [12 F.3d 208] (5th Cir. Dec. 6, 1993) (unpublished), that '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' *Accord Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill.1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

This discussion seems to indicate clearly that same-sex harassment claims are not viable under Title VII. When read in its proper context, however, this final paragraph of the *Garcia* opinion poses an interpretive problem. Because the Court had already found an independent basis to affirm the grant of summary judgment to each defendant, no part of this analysis is necessary to support the ultimate decision. Thus, the question arises whether we should treat *Garcia's* pronouncement on same-sex sexual harassment as binding precedent or dictum. When faced with this issue, some district courts in this Circuit (like the trial court here) have applied *Garcia* to dismiss same-sex harassment claims. *See Sarff v. Continental Express*, 894 F.Supp. 1076, 1082 (S.D.Tex.1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548

(W.D.Tex.1995). Others, by contrast, have ruled that *Garcia's* statements about same-sex harassment are dicta. *See Pritchett v. Sizeler Real Estate Mgmt. Co.*, 1995 WL 241855, at *2 (E.D.La. April 25, 1995); *Castellano v. Whole Foods Market, Inc.*, No. H-94-2673, slip op. at 7-8 (S.D.Tex. October 26, 1995).

We read *Garcia's* analysis of sexual harassment as binding precedent. After stating that Title VII does not recognize male-on-male claims, the Court explicitly stated that summary judgment "was proper on this basis also." This language suggests that the same-sex rationale for rejecting Garcia's claim is an alternative holding, which we treat as *stare decisis* in this Circuit. "It has long been settled that all alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion *obiter dictum*, because it is the only one of two reasons for the same conclusion.' " *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 n. 21 (5th Cir.1977) (quoting *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340, 48 S.Ct. 194, 196, 72 L.Ed. 303 (1928)). Moreover, another panel of this Court has recognized *Garcia* as binding precedent on the issue of same-sex harassment, thereby resolving any uncertainty about *Garcia's* precedential force. *See Blake v. City of Laredo*, 58 F.3d 637 (5th Cir.1995) (per curiam) (unpublished). Therefore, *Garcia* remains the law of this Circuit.[3]

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[3] Although no circuit split yet exists, other circuits have indicated that same-sex claims should not be excluded from Title VII's purview. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995) (In a heterosexual harassment action, the court noted parenthetically that "[s]exual harassment of women by men is the most common kind, but we do not mean to

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

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exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases."). Similarly, in concurring with the Second Circuit's decision in *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), Judge Van Graafeiland observed, "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex." The District of Columbia Circuit has also acknowledged the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." *Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C.Cir.1977).

The Fourth Circuit, by contrast, recently held that harassment among *heterosexuals* of the same sex cannot give rise to a hostile environment sexual harassment claim under Title VII. *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.1996). *McWilliams*, however, explicitly does not "purport to reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual." *Id.* at 1195 n. 4. In a later decision, the Fourth Circuit in dicta expressed its disagreement with the reasoning of *Garcia*. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751 (4th Cir.1996).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30510

JOSEPH ONCALE,

Plaintiff-Appellant,

versus

SUNDOWNER OFFSHORE SERVICES INCORPORATED; JOHN LYONS; DANNY PIPPEN; BRANDON JOHNSON;

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/20/96, 5 Cir., ___, ___ F.3d ___)

(July 12, 1996)

Before SMITH, DUHÉ, AND DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested

that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge